

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1265

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

THE UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

GARY COLE,
ZACHARY R. MARTIN, and
DENNIS R. MARTIN,

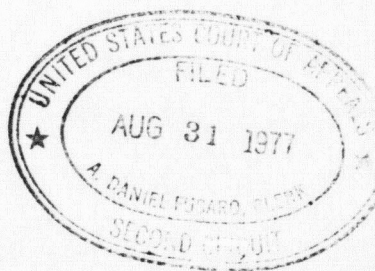
Defendant-Appellants.

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JOINT APPENDIX

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK

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PAGINATION AS IN ORIGINAL COPY

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RELEVANT DOCKET ENTRIES

12/10/76
and
12/13/76

Defendants, DENNIS R. MARTIN and ZACHARY R. MARTIN appeared with counsel for Preliminary Hearing.

Government witnesses: Sarah Johnson, Teller at M & T Bank, Hertel Avenue Branch; Frank Gawrol, All State Insurance; James McGuigan, S/A, F.B.I.

Government rests; no testimony presented on behalf of defendants, DENNIS R. MARTIN and ZACHARY R. MARTIN. Probable cause found. Bail continued. Tape numbers 76-99, 100, 101, 102 & 103.

Attorney PATRICK BAKER participated in hearing for co-defendants in this matter and the Preliminary Hearing for defendant, GARY COLE was adjourned to 12/23/76 at 11:00 A.M.

12/23/76

Defendant GARY COLE appeared with counsel and waived Preliminary Hearing. Bail continued.

01/20/77

Filed indictment on behalf of Defendants, GARY COLE, DENNIS R. MARTIN and ZACHARY R. MARTIN.

01/21/77

P.B.M.- Defendants, GARY COLE, DENNIS R. MARTIN and ZACHARY R. MARTIN enter pleas of not guilty.

Attorneys are directed to meet by 1/25/77 for voluntary discovery. Motions are ret. 1/31/77; A further bail hearing is scheduled for 1/24/77.

Filed Magistrate's complaint with affidavit, temporary commitment, and cy. of Order appointing ARTHUR F. DOBSON, JR., as counsel-Maxwell, Mag. on behalf of Defendant, ZACHARY R. MARTIN.

Filed complaint, with affidavit, temporary commitment, cy. of Order appointing MURRAY J. GRASHOW, as counsel-Maxwell-Mag., on behalf of Defendant DENNIS R. MARTIN.

Filed Magistrate's complaint, temporary commitment and cy. of Order appointing PATRICK BAKER as counsel for Defendant, GARY COLE (CJA-20), Maxwell, Mag.

01/24/77 P.B.M. - no appearance by the Govt. - the Court noted for the record that the government had objected in chambers prior to court to the release of the defendants, ZACHARY R. MARTIN and DENNIS R. MARTIN on the signatures presented. Defendants, ZACHARY R. MARTIN and DENNIS R. MARTIN released on \$10,00- surety bond signed by Rev. Willie L. Powell and Jerome Martin, cousin of Defendants.

02/04/77 Filed Govt's response to pre-trial discovery demands on behalf of defendants, GARY COLE, DENNIS R. MARTIN and ZACHARY R. MARTIN.

Filed defendant, DENNIS R. MARTIN'S notice of motion for inspection of Grand Jury Minutes, etc.

02/14/77 Suppression Hearing - Court will try to set another date for continuation of hearing on 2/28/77 on behalf of Defendants GARY COLE, DENNIS R. MARTIN & ZACHARY R. MARTIN.

03/21/77 Motion to suppress on behalf of Defendant, GARY COLE, Court set argument on the motion 4/4/77.

Hearing on motion to suppress on behalf of Defendant, ZACHARY R. MARTIN. Court set argument on the motion 4/4/77 (Witnesses are called).

Hearing on motion to suppress on behalf of Defendant, DENNIS R. MARTIN. Court set argument on the motion 4/4/77 (Witnesses are called).

04/04/77 Oral argument on motions to suppress identification & statements, decision reserved on behalf of defendants, GARY COLE, ZACHARY R. MARTIN & DENNIS R. MARTIN. COLE and HANDLEY also moved for severance on Doctrine in Bruton.

05/09/77 Court severed trial, ordered DENNIS MARTIN & ZACHARY R. MARTIN to trial on 5/10/77 and Defendants, COLE & HANDLEY to trial on 5/17/77.

05/11/77

Filed transcript of proceedings before Elfvin, J. on February 4, 1977 re motion to suppress on behalf of defendants, GARY COLE, ZACHARY R. MARTIN and DENNIS R. MARTIN.

Filed transcript of proceedings before Elfvin, J. on March 21, 1977 re motion to suppress on behalf of defendants, GARY COLE, ZACHARY R. MARTIN and DENNIS R. MARTIN.

05/10/77

Trial - Court accpeted changes of plea by both defts., ZACHARY R. MARTIN and DENNIS R. MARTIN to guilty to Count Two-bail continued as previously set for both defendants., defendant DENNIS R. MARTIN sentencing date to be set, defendant ZACHARY R. MARTIN to be sentenced 6/6/77. Court had previoulsy denied Atty. Dobson's req. to withdraw as counsel for deft. ZACHARY R. MARTIN. (Jurors had reported and were released)

05/17/77

Court accepted a plea of guilty by defendant GARY COLE to Count One, sentencing set for 6/6/77, bail continued as previously set and deft. continued in custody in lieu of bail, govt. advised Court that a State Parole detainer has been placed against deft. Court preserved right of deft. COLE to appeal denial of suppression motion.

06/06/77

Court sentenced Deft. GARY COLE as follows: Court has considered the provisions of the Youth Correction Act but declines to sentence deft. COLE under the provisions of such act, Court sentenced Deft. GARY COLE to the custody of the Attorney General for a period of eight years, to be given credit for time already served, the Court suspended execution of sentence, and placed deft. on probation for five years, probation to be supervised until the Probation Officer's determination that no further supervision needed. Court granted motion by Govt. to dismiss Count Two.

Court sentenced Deft. ZACHARY R. MARTIN as follows: Court sentenced Deft. ZACHARY R. MARTIN to the custody of the Atty. Gen. for a period of four years, to be given credit for any time served, the Ct. recommends deft. be given treatment for drug problem while in prison. Court granted motion by govt. to dismiss Count One. Court granted motion by deft. to be continued on bail pending appeal.

06/06/77

On behalf of Deft. GARY COLE - Filed deft's notice of appeal, copy ot U.S. Atty., and copy to CCA w' th copy of docket entries.

On behalf of Deft. ZACHARY R. MARTIN - Filed Deft's notice of appeal. Copy to U.S. Atty. and CCA., with copy of docket entries.

07/13/77

Court considered sentencing deft. as a youthful offender but declined to do so; court sentenced deft. to the custody of the Attorney General for a period of three years, suspended execution of sentence and placed the deft. on probation for three years. Court noted that deft. has preserved right to appeal denial of suppression motion.

07/14/77

On behalf of Deft. DENNIS R. MARTIN - filed deft's notice of appeal.

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3
4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 -vs-

Cr. 77-11

7 GARY COLE, et al.,

8 Defendants.

9
10 Motion to suppress in the above entitled action
11 held before the HON. JOHN T. ELFVIN, United States District
12 Judge, in and for the Western District of New York, at Buffalo,
13 New York, on February 14, 1977.

14 APPEARANCES:

15 RICHARD J. ARCARA,
16 United States Attorney, by
17 JAMES A. FRONK,
18 Ass't. United States Attorney,
19 Appearing on behalf of the Government.

20 PATRICK J. BAKER, ESQ.,
21 Appearing on behalf of the defendant
22 Gary Cole.

23 JOHN M. DEMPSEY, ESQ.,
24 Appearing on behalf of the defendant
25 Alphonso Handley.

MURRAY J. GRASHOW, ESQ.,
Appearing on behalf of the defendant
Dennis R. Martin.

ARTHUR F. DOBSON, ESQ.,
Appearing on behalf of the defendant
Zachary R. Martin.

INDEX TO WITNESSES

GOVERNMENT'S WITNESSES	EXAMINATION:			
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GOVERNMENT'S EXHIBITS			
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1 PROCEEDINGS OF FEBRUARY 14, 1977, COMMENCING AT 1:15 P.M.

2
3 (Defendants present, counsel present.)

4
5 (Government's Exhibits 1 through 7 were
6 premarked for identification.)

7
8 THE COURT: All right. Criminal 77-11, United States
9 versus Gary Cole, Alphonso Handley, Dennis R.
10 Martin and Zachary R. Martin for a suppression
11 hearing.

12 MR. FRONK: Shall I call our first witness?

13 THE COURT: I see all counsel are present. Is Mr. Cole
14 present, Mr. Baker?

15 MR. BAKER: Yes, he is.

16 THE COURT: Mr. Handley here, Mr. Dempsey?

17 MR. DEMPSEY: Yes, your Honor.

18 THE COURT: And the two Martins, Dennis and Zachary, are
19 they in the courtroom?

20 MR. GRASHOW: Dennis Martin is present.

21 MR. DOBSON: Zachary Martin is present.

22 MR. FRONK: I call Frank Garwol.

23 MR. DOBSON: We move to exclude all witnesses.

24 THE COURT: Anyone who is going to be a witness on these
25 hearings, please step out of the room.

1 MR. FRONK: Any defense witnesses also, your Honor?

2 THE COURT: Yes, that is right, anyone who is going to be
3 a witness step out of the room, other than of
4 course the defendants, if they are going to be
5 witnesses, they may remain.

6
7 F R A N K J. G A R W O L, 1670 Maple Road, Williamsville,
8 New York, called as a witness on behalf of the Government, and
9 being first duly sworn, testified as follows:

10
11 DIRECT EXAMINATION BY MR. FRONK:

12 Q. Mr. Garwol, by whom are you employed?

13 A. Allstate Insurance.

14 Q. Keep your voice up so all the attorneys can hear you. What
15 is your position with Allstate?

16 A. I do field work inspection for Allstate.

17 Q. Directing your attention to the 26th of November 1976,
18 were you employed by Allstate on that date?

19 A. Yes, I was.

20 Q. Did you have an occasion to be out in your automobile on
21 that day?

22 A. Yes, I was, I was doing work in that area.

23 Q. Did you happen to be at the intersection of Hertel and
24 Parkside on that date?

25 A. Yes, I was.

1 Q. Can you tell us what, if anything, took place at the inter-
2 section of Hertel and Parkside?

3 A. Well, I was waiting for the light to change to green, and
4 I observed two men coming from my right, running in front
5 of my car.

6 Q. Did you observe where they came from, sir?

7 A. Yes, I did, it was a bank located at that corner. I saw --
8 I had seen them right at the door of the bank, coming out,
9 sprinting out past my car.

10 Q. So you were able to observe them, if I understand you
11 correctly, from the door of the bank, running from there
12 past your car?

13 A. Yes.

14 Q. Can you describe the individuals that you observed?

15 A. The first individual -- I only could describe the first
16 individual that past my car. That individual had on a
17 gray felt hat with black trim and a three quarter leather
18 coat on.

19 Q. Do you recall what color the coat was?

20 A. Black.

21 Q. What did you do after the individual ran past your car?

22 A. I looked to my right and I noticed people inside the bank,
23 they were coming toward the windows, and they -- there was
24 a lot of commotion, something seemed wrong, so then I looked
25 down the street and I saw the individuals were just about

1 to turn a corner, still sprinting, around the corner of
2 the next street.

3 Q. Did there come a time when you pursued these individuals?

4 A. Yes, there did.

5 Q. And can you tell us generally what you did during the
6 pursuit?

7 A. After the light -- maybe a second went by or two, I turned
8 down the street, and I came to the street where they had
9 ran down, and I drove down the street. The only thing I
10 saw was a car at the end of the street. I caught up to
11 that car and I followed that car.

12 Q. Did you ultimately get close enough to that car to observe?

13 A. Eventually I got on Amherst Street, and I was able to
14 observe four individuals in a car, and I got a license plate
15 number and description of the car.

16 Q. What did you do after you got the license plate number and
17 the description of the car?

18 A. I came down Crescent Street, I believe, down Parkside, back
19 to the bank. I gave it to the people at the bank.

20 Q. Now, did there come a time when you returned to the bank
21 when certain suspects were brought back to the bank?

22 A. Yes.

23 Q. About how long was it from the time when you first observed
24 the individuals run by your car at the stop light until
25 the suspects were brought back to the bank?

1 A. About a half hour, forty five minutes, around there.

2 Q. Now, were you in the bank when the suspects were brought
3 back?

4 A. Yes, I was.

5 Q. Can you describe, as best you can recall, what was done
6 when the suspects were brought back to the bank?

7 A. I was standing behind the teller cage area and four people
8 were brought in, and I stood there, and then -- I think it
9 was a Buffalo police officer -- they took two hats, one
10 hat that I guess the gentleman brought in off the street,
11 they said it belonged to one of the suspects, and another
12 hat, a black hat -- the other one was gray with black trim --
13 they put them on each individual, and then the FBI agent
14 standing next to him -- what I mean like they held it on
15 each one a second or so -- they said, 'Can you pick out a
16 combination, which one do you think was the suspect you
17 had seen?' I did.

18 Q. Now, am I correct, sir, in asking you that each of the four
19 tried on each of the two hats?

20 A. Correct.

21 Q. Were there coats or any other attire on any of them?

22 A. Yes, there was.

23 Q. Did all of them have a coat on at one time or another?

24 A. No, they didn't.

25 Q. Was there anything in your mind, as you recall the technique,

1 which in any way indicated preference toward any of the
2 individuals?

3 A. No.

4 MR. BAKER: I object to the form of the question.

5 THE COURT: Overruled.

6 BY MR. FRONK:

7 Q. Do you recall if any of them were handcuffed?

8 A. I remember one individual was handcuffed that I recall.

9 Q. Well, when you observed the four of them standing there,
10 do you recall whether any or all or anyone was handcuffed?

11 A. Just one I kind of remember had handcuffs on. I don't
12 remember if the other ones were handcuffed.

13 MR. DEMPSEY: I can't hear the witness.

14 THE WITNESS: I recall one of them was handcuffed, the other
15 three I wouldn't know.

16 BY MR. FRONK:

17 Q. Were you, in fact, able to pick someone out from the sus-
18 pects as the individual you had seen run by your car a
19 short time before?

20 A. Yes, I was.

21 Q. Were you able to learn that individual's name?

22 A. Yes, I was.

23 Q. Can you tell us who it was?

24 A. Gary Cole.

25 MR. FRONK: I have no further questions, your Honor.

1 CROSS EXAMINATION BY MR. BAKER:

2 Q. Mr. Garwol, you were at the intersection of Hertel Avenue
3 and Parkside, is that correct?

4 A. Yes.

5 Q. In which direction was your automobile travelling?

6 A. Travelling west.

7 Q. So that would be toward Delaware Avenue, toward Parkside,
8 correct?

9 A. Correct.

10 Q. Were you stopped at the light?

11 A. Yes.

12 Q. Any other cars in that area?

13 A. No, there was not.

14 Q. You were the only car stopped at the light?

15 A. Yes.

16 Q. What lane of traffic were you in?

17 A. I was in the lane next to the yellow line.

18 Q. You were in the center lane?

19 A. Yes.

20 Q. So that lane would be the lane farthest from the bank at
21 that point?

22 A. Yes.

23 Q. As you were sitting there were you looking at the light
24 at all?

25 A. When I first came to the intersection I was looking at the

1 light, then I was just gazing around then.

2 Q. Was this the first time you saw people coming out of the
3 bank?

4 A. When I looked to the right, that is when I observed the
5 individuals coming out of the bank.

6 Q. The first time you looked to the right after stopping at
7 that light you saw people coming out of the bank, is that
8 correct?

9 A. Correct.

10 Q. How many people did you see coming out?

11 A. Two.

12 Q. Did you see them at the doorway or at the curb?

13 A. At the door, outside the door.

14 Q. How far from your car was this?

15 A. Ten, fifteen feet.

16 Q. Now, at this point were these individuals running?

17 A. They were starting to sprint.

18 Q. They were running then at this point?

19 A. Right.

20 Q. They didn't have to stop at the curb, did they?

21 A. No, they didn't.

22 Q. In fact, the light was in their favor for crossing in front
23 of you?

24 A. Correct.

25 Q. Did they both have hats on?

1 A. No, they didn't.

2 Q. Only one had a hat on?

3 A. Only one individual I remember had a hat on, the first
4 one, the first individual that went in front of my car.

5 Q. Did both these individuals cross in front of your car?

6 A. Both did, yes.

7 Q. Both running in the same direction, in the same path?

8 A. Correct.

9 Q. Were they running next to each other or one in front of the
10 other?

11 A. One was in front, one was about two feet behind.

12 Q. You mean a couple of steps behind?

13 A. Right.

14 Q. Who ran across the car first?

15 A. The individual I saw with the hat.

16 Q. In front of your car?

17 A. Correct.

18 Q. Was it a big hat?

19 A. It was a big hat, a gray brim hat with black trim.

20 Q. You say "brim," was there a brim all the way around the
21 hat?

22 A. It had a -- yes, there was a brim to the hat, correct.

23 Q. A brim to the hat, pulled down over the forehead?

24 A. I don't know how it was pulled down, I know it was gray.

25 Q. The hat was on the person's head?

1 A. Yes.

2 Q. It was covering half of his forehead? You know how a
3 person wears a hat?

4 A. He was running so his head was up.

5 Q. I am asking you how the hat was on his head.

6 A. It was on his head.

7 Q. The hat was on his head --

8 THE COURT: One at a time. Wait for the question, and
9 you wait for the answer.

10 MR. BAKER: I'm sorry.

11 THE WITNESS: The hat was on his head, that is the only way
12 I can describe it.

13 BY MR. BAKER:

14 Q. Would you say the hat was placed on his head in the normal
15 fashion that a hat would be placed upon his head?

16 MR. FRONK: I object to the normal fashion the hat is
17 placed on his head.

18 THE COURT: Overruled.

19 THE WITNESS: Would you repeat it?

20 THE COURT: Read the question.

21
22 (Thereupon the last question was read by
23 reporter.)

24
25 THE WITNESS: I wouldn't know, I couldn't say.

1 BY MR. BAKER:

2 Q. Did you see it covering a portion of his forehead?

3 A. I couldn't say. I just saw the hat on his head, I don't
4 know how it was positioned.

5 Q. Did this person have a coat on?

6 A. Yes, he did.

7 Q. You saw him come out of the bank, he ran across your car
8 very quickly, is that fair to say?

9 A. Yes.

10 Q. You saw them at that point for a brief period of time, is
11 that fair?

12 A. Yes.

13 Q. And as they crossed in front of your car, you saw them
14 from the rear, is that correct?

15 A. Yes.

16 Q. And when the person ran in front of your car, you saw the
17 side of that person's face and body, is that correct?

18 A. Correct.

19 Q. Is it fair to say that you probably only saw that individual
20 you later identified for only approximately -- I haven't
21 finished the question -- for only approximately say five
22 seconds at the most?

23 A. No, I would say maybe a couple more seconds longer.

24 Q. Seven seconds at the most?

25 A. Seven.

1 Q. You are telling me it took them about seven seconds to run
2 approximately fifteen, twenty feet?

3 A. No. I looked -- after I looked in the bank -- after I
4 pursued them -- after I looked in the bank I first saw them,
5 I looked to the bank, then I looked back again at them, and
6 I seen them turning the corner.

7 Q. Well, I'm talking about the opportunity you had to look
8 at the individual's face whom you have identified --

9 A. Okay.

10 THE COURT: Wait for the question.

11 MR. BAKER: I would like to start it over.

12 THE COURT: All right.

13 BY MR. BAKER:

14 Q. I am now talking about your opportunity, the amount of
15 time you were able to see the individual's face. Now, that
16 was only approximately five seconds or so, is that correct?

17 A. Correct.

18 Q. And the remainder of the time when you saw these individuals,
19 you only saw them from the rear, you didn't see their face
20 at this point?

21 A. Correct.

22 Q. Now, you followed this yellow car you have described, and
23 at one point you claim to have gotten close enough to have
24 seen four individuals in the car?

25 A. Correct.

- 1 Q. You are telling us you saw their faces?
- 2 A. No.
- 3 Q. You just saw four forms in the car?
- 4 A. Correct.
- 5 Q. And you eventually came back to the bank at Hertel and
- 6 Parkside, is that correct?
- 7 A. Yes.
- 8 Q. Were the police there at this time?
- 9 A. They had just gotten there.
- 10 Q. Were there several police cars there at this time?
- 11 A. I think there was two.
- 12 Q. Quite a few policemen there?
- 13 A. That is right, starting to come in at that time.
- 14 Q. Did you advise the police that you had followed the car
- 15 and where you had followed it to?
- 16 A. Yes, I did.
- 17 Q. Did you give them a description at all of any of the
- 18 individuals?
- 19 A. Not of the individuals, no, I didn't.
- 20 Q. No physical description?
- 21 A. No.
- 22 Q. No description as to height, weight?
- 23 A. Afterwards. First I gave them the description of the
- 24 car.
- 25 Q. When you say "afterwards," do you mean after they were

1 brought back to the bank?

2 A. No. First I gave them the description of the car, of the
3 car and the license plate number, and then after that,
4 about thirty seconds after that, a minute, then there was
5 confusion going on at the bank, and I told them that I had
6 seen the two individuals in front of my car.

7 Q. How did you describe these individuals?

8 A. I told them that the one individual was wearing -- had a
9 gray hat with black trim and a three quarter length black
10 leather coat, he was tall, slender, about a hundred seventy
11 pounds, and he looked kind of between eighteen to twenty
12 one, somewhere in there.

13 Q. Was this the person you later identified?

14 A. Yes.

15 Q. You were back to the bank about a half an hour to forty
16 five minutes when some people were brought in?

17 A. Yes, I was still at the bank.

18 Q. Now, this was about a half hour to forty five minutes after
19 you had seen these individuals run across the front of
20 your car?

21 A. Correct.

22 Q. When these individuals came back where were you standing
23 in the bank?

24 A. Right behind the tellers area, about ten, fifteen feet from
25 the people that were brought back, from the bank suspects.

1 Q. When they were brought back, they were brought back in
2 custody, were they not?

3 A. What do you mean by "custody?"

4 Q. Brought back by policemen or FBI agents?

5 A. Yes.

6 Q. You knew that, you saw them come back with the police, did
7 you not?

8 A. I saw a door open up and four individuals came in the door,
9 there was police there behind them.

10 Q. You saw four individuals walk in with police behind them?

11 A. That is correct.

12 Q. And where did they go in the bank?

13 A. They were standing in a straight line, all four individuals
14 standing.

15 Q. The police standing right by them?

16 A. No, there were police about two feet from them.

17 Q. Were these individuals separated from the rest of the people
18 in the bank?

19 A. I don't know what you mean by "the rest of the people."

20 Q. Well --

21 A. They were about -- the closest person -- the police were
22 there within two feet of them -- the rest of the individuals
23 were behind the counter, I believe, the tellers area.

24 Q. The bank employees, people like yourself, were all behind
25 the tellers area, correct?

- 1 A. I believe they were.
- 2 Q. The only people near these individuals that were brought
3 back to the bank were police officers, is that correct?
- 4 A. I believe so, yes.
- 5 Q. And these people were in handcuffs?
- 6 A. I don't recall.
- 7 Q. Now, you said on direct examination --
- 8 A. I said there was one individual I believe had handcuffs on,
9 one, the other three I didn't know.
- 10 Q. The other three you can't recall now if they had handcuffs,
11 is that correct?
- 12 A. That is correct, I don't know if they had them on or not.
- 13 Q. They may have had them on?
- 14 A. I don't know if they had them on.
- 15 Q. You can't tell us today?
- 16 A. Correct.
- 17 Q. You know for sure that one of those individuals had hand-
18 cuffs on?
- 19 A. Yes.
- 20 Q. Now, after these people were brought back into the bank,
21 did you talk to some FBI agents or police officers?
- 22 A. There was an FBI agent standing next to me.
- 23 Q. And did he ask you to view these individuals?
- 24 A. He just asked me to look at the individuals, correct.
- 25 Q. He told you that, right?

- 1 A. Yes.
- 2 Q. Did he mention that, you know, these were the people that
3 are suspects now, is that correct?
- 4 A. He stated that these four are suspects, right.
- 5 Q. He told that to you, is that correct?
- 6 A. Yes.
- 7 Q. At that point you knew these four individuals were the
8 people that were suspected of this bank robbery?
- 9 A. Correct.
- 10 Q. This was before you were asked to pick somebody out, is
11 that correct?
- 12 A. Correct.
- 13 Q. Did anybody tell you at that time that these people were
14 arrested at the place where you followed the car?
- 15 A. I followed the car to the intersection, then I left. I
16 don't know where they were arrested at.
- 17 Q. Did anybody tell you one of these people was the owner of
18 the car?
- 19 A. No, they didn't.
- 20 Q. Now, were you the first person to attempt to pick somebody
21 out?
- 22 A. We were all separated, and I think everybody was doing it
23 at the same time, each person that was with a police officer,
24 if you could identify anybody.
- 25 Q. Did you see anybody else identifying anybody?

1 A. I wasn't paying attention to anybody else.

2 Q. Now, before you made an identification was the hat passed
3 around to these individuals to place upon their head?

4 A. Two hats were placed on the individuals.

5 Q. Just two individuals?

6 A. No. Two hats were placed on all four.

7 Q. Separately, is that correct? One at a time or both at
8 once?

9 A. I believe like they put on different combinations, both
10 hats on different people. They put on two, put on another
11 two, and kept switching it around. They would hold it for
12 a couple of seconds.

13 Q. How many people in the group had a black three quarter
14 length leather coat on?

15 A. One.

16 Q. Just one?

17 A. Yes.

18 Q. Was this a leather coat or did it look like leather?

19 A. Yes.

20 Q. There was only one individual who wore that coat, is that
21 correct?

22 A. That is correct.

23 Q. At that point you knew the individual who you feel you got
24 a better look at was wearing a black three quarter length
25 leather coat, did you not?

1 A. Could you repeat the question?

2 Q. Sure. At the time you made an identification in the bank
3 there, you knew in your mind that the person you got the
4 best look at or a look at running across the front portion
5 of your car was the one who had worn a black leather three
6 quarter length coat, did you not?

7 A. I believe the person that was in the bank was the person
8 I had seen.

9 Q. You knew prior to your identifying a person in the bank,
10 okay, that one of the persons you had seen had a black
11 leather three quarter length coat, didn't you?

12 A. Yes.

13 Q. Okay. Did you make any other identification in the bank?

14 A. No, I didn't.

15 Q. Were you asked to look at any pictures of the individuals?

16 A. No, I wasn't.

17 Q. How long was it while you were in the bank after seeing
18 these people that you made or picked somebody out?

19 A. About a minute, between thirty seconds and a minute.

20 Q. You had an opportunity to look at them for about a minute
21 there?

22 A. Yes, I did.

23 Q. The gray hat that was passed around, was this placed upon
24 this individual who you identified?

25 A. Yes, it was.

- 1 Q. After you made an identification were you told who the
2 individual was?
- 3 A. Yes, I was.
- 4 Q. That was right there at the bank, was it not?
- 5 A. Yes.
- 6 Q. The fact that this individual had this black leather three
7 quarter length coat, and the passing of this gray hat which
8 you saw before, did that help you in making your identifi-
9 cation?
- 10 A. It was part of my identification, yes.
- 11 Q. The coat and also the hat itself, is that correct?
- 12 A. There was something else, yes.
- 13 Q. There was something else?
- 14 A. Yes, his physical description.
- 15 Q. Right, the physical description. These two qualities, the
16 coat and the fact that the hat was placed upon his head in
17 the bank, that aided in your identification?
- 18 A. It was a combination of everything.
- 19 Q. This was part of the combination which helped?
- 20 A. Yes.
- 21 Q. Plus at that point, too, you also knew these people were
22 suspected of robbing this bank by the police?
- 23 A. Right.
- 24 Q. The four individuals that were brought back --
- 25 A. Yes.

1 Q. -- were at this time suspected of robbing that bank?

2 A. Yes.

3 Q. You knew that, too?

4 A. I was told those four individuals -- after I was told their
5 identity -- they were suspects.

6 Q. Do you see that individual --

7 THE COURT: After you were told who they were you were
8 told they were suspects?

9 THE WITNESS: Yes. They brought back four individuals and
10 then that is when I was told these are four
11 suspects.

12 THE COURT: Was it after that that they put the hats on
13 the individuals?

14 THE WITNESS: No, the hats were put on the individuals before
15 that.

16 THE COURT: First?

17 THE WITNESS: Yes.

18 THE COURT: What, if anything, happened in the way of
19 anybody saying anything to you prior to the
20 time when the hats were put on the individuals,
21 other than the FBI man telling you to look at
22 them?

23 THE WITNESS: If you can identify them, that is all.

24 THE COURT: You were not told at all how they happened to
25 corral these four people and bring them in?

1 THE WITNESS: No, I was not.

2 BY MR. BAKER:

3 Q. So I am clear now, before you identified anybody, and before
4 you were asked to pick anybody out, you were told that
5 these people were suspects?

6 A. No one directly said they were suspects. Nothing was said.
7 They brought back four individuals and I was asked if I
8 could identify any of the four people.

9 Q. That is different from the testimony you gave earlier, is
10 it not?

11 A. I don't know what the difference is.

12 Q. I asked you before if you were told by either an FBI agent
13 or a policeman that these individuals were suspects prior
14 to your identifying them and you answered me yes.

15 A. I was never told they were suspects. There was four indi-
16 viduals, they asked if I could identify any one, they never
17 said they were suspects. The word "suspect" wasn't used.

18 Q. That is different than your testimony earlier, isn't it?

19 A. I don't know.

20 Q. You knew at the time, did you not, that these individuals
21 were suspects in the bank robbery?

22 A. I just --

23 Q. Can you answer it yes or no?

24 A. I'm lost at what you're trying to -- the point you are
25 trying to make.

1 THE COURT: Don't worry about what he is trying to do, just
2 answer the question.

3 BY MR. BAKER:

4 Q. At the time that you were asked to identify somebody, at
5 the time these individuals were brought back into the bank,
6 you knew at that time prior to your identification that they
7 were suspects in the bank robbery, did you not?

8 A. I didn't know they were suspects. I was just -- I mean --

9 THE COURT: You thought they were?

10 THE WITNESS: I thought they were. I didn't know they were
11 suspects. My opinion was --

12 THE COURT: Obviously they were brought in there for some
13 purpose, you were there immediately following
14 a robbery, there had to be in your mind some
15 idea that whoever brought them in felt that
16 these four might be the people?

17 THE WITNESS: Yes, sir.

18 BY MR. BAKER:

19 Q. Okay. You identified somebody, do you see him in the
20 courtroom today?

21 A. Yes.

22 Q. Can you describe him?

23 A. Sitting over there.

24 Q. Could you describe him?

25 A. Wearing the light coat.

1 Q. Light coat?

2 A. Light leather coat.

3 Q. Wearing a tan coat?

4 A. Yes.

5 Q. That is the individual you identified?

6 A. Yes.

7 Q. Right?

8 A. Yes.

9 MR. BAKER: I have no further questions.

10 THE COURT: Anything further?

11 MR. FRONK: I have nothing further.

12 THE COURT: Thank you.

13 MR. BAKER: Let the record reflect that Mr. Garwol has
14 identified Alphonso Handley just now in the
15 courtroom.

16 MR. FRONK: When did this take place?

17 THE COURT: Just now, he pointed out the individual with
18 the tan coat.

19 MR. BAKER: I asked Mr. Garwol the question to the effect
20 can you today identify the person you have
21 identified previously, and he said yes, and
22 he identified Mr. Handley.

23 THE COURT: Anything further?

24

25 CROSS EXAMINATION BY MR. DEMPSEY:

1 Q. The first gentleman across the street in front of you was
2 the one that you later identified as -- told people was
3 a fellow named Gary Cole, is that right? The first one
4 that you picked out later on?

5 A. Excuse me?

6 Q. The first one across the street that came in front of you,
7 was that the one you picked out later on?

8 A. Yes, it was.

9 Q. You have absolutely no idea of what the second individual
10 looked like?

11 A. No, I don't.

12 Q. And when did you realize there had been a bank robbery?

13 A. When I came back -- excuse me -- can I say something, please?
14 I was told that individual -- you just said that was his
15 name -- that is who I was told what the name was, Gary Cole,
16 that individual there. I was told that was his name.

17 BY MR. DEMPSEY:

18 Q. Who told you?

19 THE COURT: You are saying the man you have identified
20 was the individual --

21 THE WITNESS: I am --

22 THE COURT: Wait a minute. The man you have identified
23 today in court, you are now saying is the one
24 you identified at the bank?

25 THE WITNESS: I believe it was.

1 THE COURT: Regardless of name?

2 THE WITNESS: Regardless of name.

3 BY MR. DEMPSEY:

4 Q. So that the first one to cross in front of you --

5 A. Yes.

6 Q. -- who ran and sprinted across in front of you was the
7 one that you got the good look at?

8 A. I got a look at him.

9 Q. Some kind of a look at him?

10 A. Yes.

11 Q. The second individual you couldn't describe at all?

12 A. No.

13 Q. If he was to walk in the courtroom today, you wouldn't have
14 any idea if it was him or not?

15 A. I wouldn't.

16 Q. There is no way you could identify him in any way?

17 A. No, I couldn't.

18 Q. After they sprinted across in front of you what did you do?

19 A. I followed -- the light -- waited a second -- after they
20 crossed in front of my car I looked at the bank, I saw
21 something was wrong, and I looked back down the street where
22 the individuals were running, and the light changed, and I
23 went down that street and --

24 Q. Where were they when you looked to your left and saw them
25 running down the street?

- 1 A. Just about to turn the corner.
- 2 Q. The corner of the next block?
- 3 A. That is correct.
- 4 Q. The block south of Hertel Avenue, is that correct?
- 5 A. Correct.
- 6 Q. And then after they were just about to turn the corner you
- 7 looked back up at the light?
- 8 A. Correct.
- 9 Q. And you waited until it turned green, is that correct?
- 10 A. Yes, it happened about a second or two --
- 11 Q. You waited a couple of seconds and the light turned green,
- 12 is that correct?
- 13 A. Correct.
- 14 Q. What did you do then?
- 15 A. I was -- just as I was about to turn another vehicle all
- 16 of a sudden was there. I was looking at the light and it
- 17 turned, and just when I wanted to make my turn --
- 18 Q. You were going to make a left hand turn to go after the
- 19 people?
- 20 A. Correct, and a car went by then.
- 21 Q. A car coming in the other direction?
- 22 A. A car coming in the other direction went by me, I moved
- 23 up so that I spun the back end of my car around.
- 24 Q. You accelerated so fast you shot through the intersection?
- 25 A. I was by the intersection, and then I spun my wheels around.

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1 Q. Let's get this straight. You looked back, you looked up
2 at the light, the light was red?

3 A. Yes.

4 Q. You waited for the light to turn green?

5 A. Correct.

6 Q. After the light turned green you were going to make a
7 left hand turn?

8 A. Yes.

9 Q. You were unable to make a left hand turn at that time, there
10 was a car coming in the other direction?

11 A. Correct.

12 Q. For one reason or another you put your foot down on the
13 accelerator, you went through the intersection, you shot
14 through the intersection, rather than making your left hand
15 turn?

16 A. I was -- when I was waiting for the light I was moving up
17 more and more. I couldn't make the turn, I moved up and
18 I stepped on the gas and swung my back end around.

19 Q. So you went -- instead of making a left hand turn as you
20 intended to, you went ahead on Hertel Avenue, is that right?

21 A. A couple of feet, yes.

22 Q. Then you had to turn your car around and come back to the
23 intersection and --

24 A. That's when I fishtailed.

25 Q. Then you had to take a right hand turn, is that correct?

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- 1 A. Yes.
- 2 Q. Okay. Then you were going south on Parkside Avenue, is
- 3 that correct?
- 4 A. Yes.
- 5 Q. And were the people in your sight at that time?
- 6 A. I made -- as soon as I went down Parkside I made a left --
- 7 Q. Listen to the question. After you had gone across the
- 8 intersection, fishtailed and come back to the intersection,
- 9 were the two individuals still in your sight?
- 10 A. No, they were not.
- 11 Q. Then I take it you proceeded a block south on Parkside Avenue,
- 12 is that correct?
- 13 A. Correct.
- 14 Q. And you eventually got to the corner of Parkside Avenue and
- 15 the block -- the intersection of the block one block south,
- 16 is that correct, or street?
- 17 A. Yes.
- 18 Q. And did you see those individuals at that time?
- 19 A. I saw -- after I made the turn down the street I saw a car.
- 20 Q. Did you see the two individuals running at that time?
- 21 A. There was no individuals running.
- 22 Q. At another hearing I asked you this question, I said, "Could
- 23 you say for sure whether those two individuals that you saw
- 24 were in the car or not?"
- 25 A. No, I couldn't.

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- 1 Q. You couldn't say one way or the other?
- 2 A. No, I could not.
- 3 Q. Could you say whether they had gone into one of the houses
- 4 on that street?
- 5 A. I couldn't say that.
- 6 Q. So the next thing you know there are four individuals in
- 7 a car?
- 8 A. Correct.
- 9 Q. And where was that car in relation to the intersection --
- 10 in relation to Parkside Avenue when you first saw it?
- 11 A. It was at the end of the next street, when I turned onto
- 12 the street, the first block.
- 13 Q. What was the name of that street you turned onto?
- 14 A. I don't know the name.
- 15 Q. You saw that car, it was a block away from you?
- 16 A. Correct.
- 17 Q. And was it stopped at the stop sign when you saw it?
- 18 A. Yes.
- 19 Q. Did it then usually accelerate in any way?
- 20 A. Yes, it did.
- 21 Q. It just took off --
- 22 A. It made --
- 23 Q. Had it stopped at the stop sign?
- 24 A. Yes.
- 25 Q. That is where it was when you first saw it?

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- 1 A. Correct.
- 2 Q. Then you eventually came up to that car, did you?
- 3 A. Yes, I did.
- 4 Q. How far were you away from that car, what is the closest
- 5 you got to that car?
- 6 A. About ten or fifteen feet.
- 7 Q. Before you testified twenty feet, would that make sense
- 8 to you?
- 9 A. It was around that distance.
- 10 Q. It could be twenty feet away?
- 11 A. Correct.
- 12 Q. That was the closest you ever got to the four individuals
- 13 in that car?
- 14 A. Correct.
- 15 Q. Then I take it you went back to the bank, did you?
- 16 A. Yes, I did.
- 17 Q. And who did you talk to at the bank?
- 18 A. I don't know, there was a woman that was on the phone I
- 19 believe to the police or somebody, and they were giving --
- 20 someone said that they had a license plate number of a car
- 21 and a description -- I don't know if they gave a description
- 22 of the car -- I told them I followed the car I believed
- 23 was the car.
- 24 Q. Did you give them a license number?
- 25 A. Yes.

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1 Q. Was it the same license number as the other individual had
2 given?

3 A. No.

4 Q. It was a different license number?

5 A. There was a different alphabet number.

6 Q. Someone else had picked up a different license number than
7 the one you gave?

8 A. Correct.

9 Q. Now, who was the first police officer that you talked to
10 or member of the FBI?

11 A. Jim McGuigan.

12 Q. Did you give him your name?

13 A. Yes, I did.

14 Q. Your address, your employment?

15 A. Yes, sir, I did.

16 Q. And did you tell him that you would be available at some
17 time in the future to testify or pick out gentlemen in the
18 lineup?

19 A. I wasn't asked if I would be available.

20 Q. And you gave that information. Did they say for you to
21 stay there?

22 A. Excuse me?

23 Q. Did they say you were free to go?

24 A. They asked us to stay.

25 Q. Did they tell you why they wanted you to stay?

- 1 A. They asked us to s . .
- 2 Q. When was the first time you knew they were going to bring
- 3 some gentlemen back?
- 4 A. Maybe about a minute before they did. They said -- I don't
- 5 know, there was commotion going on, I don't know what was
- 6 going on, I was mostly talking with the agent.
- 7 Q. I take it that the four gentlemen they brought back were
- 8 all black?
- 9 A. Correct.
- 10 Q. Were any other black men in the bank at all?
- 11 A. There might have been, I'm not sure.
- 12 Q. You don't remember?
- 13 A. No.
- 14 Q. And were the black men they brought back all the same age?
- 15 A. I guess so. I really don't know.
- 16 Q. You don't have any idea?
- 17 A. I don't have any idea.
- 18 Q. Did they stand the four black men away from any other
- 19 individuals in the bank?
- 20 A. They were about a couple -- two feet, three feet from the
- 21 police officers.
- 22 Q. They had them aside, is that correct, from the other people,
- 23 they were not mingling in the crowd?
- 24 A. No, they were not.
- 25 Q. So that the record is clear, the gentleman that you picked

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1 out at the bank is the gentleman over there in the light
2 coat?

3 A. Yes, it is.

4 Q. That is the one they told you was Gary Cole?

5 A. Yes, it is.

6
7 CROSS EXAMINATION BY MR. GRASHOW:

8 Q. Mr. Garwol, when you first got to the intersection you saw
9 these two individuals coming from somewhere, correct?

10 A. Correct.

11 Q. When you first observed them they were in front of your
12 car?

13 A. No, they were by the bank door.

14 Q. At the bank?

15 A. They were just a step from the bank door.

16 Q. Did you see them come out of the bank?

17 A. No, they were just right by the door.

18 Q. Would it be fair to say that you saw them at the crossline
19 where the intersection between the curb and the street
20 begins?

21 A. No.

22 Q. You saw them right at the bank proper?

23 A. Yes.

24 Q. And how long did you see them before they crossed your car?

25 A. Two or three seconds.

1 Q. Before they got in front of your car?

2 A. Yes.

3 Q. I take it at that point you had no reason to observe them,
4 is that correct?

5 A. No.

6 Q. You had no reason to suspect anybody robbed a bank, did you?

7 A. No.

8 Q. You were not paying particular attention to these individuals,
9 were you?

10 A. Just that they were sprinting in front of my car.

11 Q. Well, we are talking about before they got to your car, you
12 were not paying any particular attention to these two indi-
13 viduals, were you?

14 A. No.

15 Q. How many other individuals were in the area where these
16 two people were when you first saw them?

17 A. None.

18 Q. So it would be fair to say that you did not take any
19 cognizance of or any definite look at these two men until
20 they got in front of your car, is that correct?

21 A. Right.

22 Q. How long were they in front of your car?

23 A. Just a moment, a second.

24 Q. A second?

25 A. Yes.

43

- 1 Q. You mentioned that you were gazing around at the light,
2 what do you mean by that?
- 3 A. I was observing, you know, the intersection, looking around.
- 4 Q. You were waiting for the light to change green?
- 5 A. That is correct.
- 6 Q. You were looking about, you were not paying attention to
7 anything, is that correct?
- 8 A. Correct.
- 9 Q. Now, you said that when you were in the bank and these four
10 individuals were brought back into the bank there was an
11 FBI agent standing next to you?
- 12 A. Correct.
- 13 Q. By the way, do you know if that agent is here?
- 14 A. Yes.
- 15 Q. Do you know what his name was?
- 16 A. Jim McGuigan.
- 17 Q. How long were you and McGuigan together before you made
18 the identification?
- 19 A. About -- I don't know -- ten, fifteen minutes.
- 20 Q. I take it at that point he was asking you about the robbery,
21 is that correct?
- 22 A. That is correct.
- 23 Q. And you were asking him questions about it?
- 24 A. No, I wasn't, just giving him information.
- 25 Q. How long did it take you to give him the information?

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1 A. Well, spread out over maybe ten, fifteen minutes, because
2 they were -- he was talking with someone else, a different
3 agent, and he would come back.

4 Q. You made no inquiry of him as to what happened?

5 A. I didn't ask -- well, you know, I didn't ask him about how
6 much was taken or nothing like that.

7 Q. Did you ask about the people who robbed the bank?

8 A. I don't recall if I did.

9 Q. Do you recall him telling you what the people looked like
10 who robbed the bank?

11 A. No.

12 Q. Any other conversation you had between the two of you,
13 other than you giving a narrative of what happened to
14 McGuigan while waiting for the four suspects to come back
15 to the bank?

16 A. No.

17 Q. When the four individuals came back into the bank, what
18 did Mr. McGuigan say to you?

19 A. I was asked if I could identify anyone.

20 Q. What else was said?

21 A. That was about it, if I could identify any of the four
22 individuals.

23 Q. Did he say who the four individuals were?

24 A. No, not at that time.

25 Q. Do you see the four individuals that were brought into the

1 bank here today?

2 A. A couple of them.

3 Q. One of whom you have identified as Gary Cole?

4 A. Yes, sir.

5 Q. When you were at the intersection trying to make a turn
6 onto Parkside going south, from the time that the individuals
7 sprinted past your car down Parkside, how much time elapsed
8 until the light turned green?

9 A. About a second, one or two seconds.

10 Q. At the time they started sprinting did you realize something
11 had been wrong?

12 A. Yes, I did.

13 Q. Still you waited for the light to turn green, rather than
14 turn and follow them immediately?

15 A. Correct.

16 MR. GRASHOW: Nothing further. Thank you.

17 MR. DOBSON: Nothing, your Honor.

18 THE COURT: Okay.

19

20 REDIRECT EXAMINATION BY MR. FRONK:

21 Q. Just so I understand, inasmuch as I didn't hear the earlier
22 question, the man who sprinted in front of your car, who
23 you have spoken about, that first individual, was that the
24 same individual you identified later on at the bank?

25 A. Yes.

1 Q. It wasn't the second individual, it was the first individual?

2 A. Yes.

3 MR. DEMPSEY: I object to the leading, your Honor.

4 THE COURT: Sustained.

5 BY MR. FRONK:

6 Q. Was that the same individual that you identified?

7 A. Excuse me?

8 Q. You were asked if you could pick out anyone at the bank,
9 is that correct?

10 A. Correct.

11 Q. You did in fact pick someone out?

12 A. Yes.

13 Q. Who was the person that you picked out, in terms of what
14 you had previously seen?

15 A. That individual over there.

16 Q. No, in terms of what you had previously seen that day.

17 THE COURT: You mean whether he was the first or second?

18 MR. FRONK: Yes. We can't lead.

19 THE WITNESS: The first man.

20 THE COURT: If you ask him whether it was the first or
21 second man or either of those men, it is not
22 leading.

23 BY MR. FRONK:

24 Q. Was the man you picked out in the bank the first individual
25 that ran in front of your car?

1 A. Yes.

2 Q. It wasn't --

3 THE COURT: That is leading. If you ask him if it was the
4 first or second man or either of them, it is
5 not leading. Go ahead.

6 BY MR. FRONK:

7 Q. Mr. Garwol, is that individual in court today?

8 A. Yes.

9 Q. Would you point him out?

10 A. The individual I had seen was the gentleman over there in
11 the tan coat, the leather coat, sitting over there.

12 Q. That is the same individual that ran in front of your car,
13 the first individual?

14 A. Yes.

15 Q. That is the same individual you picked out at the bank?

16 A. Yes.

17 MR. FRONK: I have no further questions.

18 THE COURT: All right, thank you.

19 MR. BAKER: Your Honor, I would like you to admonish the
20 witness not to discuss his testimony with any
21 potential witness.

22 THE COURT: All right. We have witnesses outside, don't
23 talk with any one of them to any degree. After
24 the hearing is over you may, but not until we
25 have concluded.

1 (Witness excused.)

2
3 THE COURT: Now, I've got to recess this briefly. Mr.
4 O'Neill is here and Mr. McIntyre is here on a
5 matter we had this morning.
6

7 (Thereupon the court was in recess.)
8

9 PROCEEDINGS RESUMED, PURSUANT TO RECESS.
10

11 MR. FRONK: I call Sarah Johnson, please.
12

13 S A R A H J O H N S O N, 25 Northumberland Avenue, Buffalo,
14 New York, called as a witness on behalf of the Government, and
15 being first duly sworn, testified as follows:
16

17 DIRECT EXAMINATION BY MR. FRONK:

18 Q. Is it Miss or Mrs. Johnson?

19 A. Miss.

20 Q. Miss Johnson, can you tell us by whom you are employed?

21 A. M & T Bank.

22 Q. And at what branch are you employed?

23 A. Hertel and Parkside.

24 Q. Directing your attention to the 26th of November 1976,
25 were you employed at the bank on that date?

1 A. Yes, I was.

2 Q. Did there come a time in the morning of that date when you
3 were on your break?

4 A. Yes.

5 Q. And where would you have been in the bank when you were
6 on your break?

7 A. In the rear, in the lunch room.

8 Q. When you say in the rear of the bank, can you tell us how
9 your bank is located so we can understand what streets are
10 involved?

11 A. It is right off Hertel Street, directly in the back, off
12 Parkside.

13 Q. When you were in the rear of the bank what street are you
14 looking at?

15 A. Parkside.

16 Q. Then Hertel would run across the front of the bank?

17 A. Yes.

18 Q. Did you happen to notice anything when you were on your
19 break?

20 A. I noticed a gentleman walking by.

21 MR. GRASHOW: Your Honor, could the witness get closer to
22 the microphone?

23 THE COURT: Pull that down toward you. That is it.

24 BY MR. FRONK:

25 Q. Can you describe this individual that you noticed?

1 A. Yes. He was a gentleman walking by with a black leather
2 coat on, a black hat and glasses.

3 Q. Can you give us a general physical description of him?

4 A. About five five, one hundred sixty pounds.

5 Q. About how far away was he?

6 A. From about to the swinging doors.

7 Q. At the back of the courtroom here?

8 A. Yes.

9 Q. Now, was anyone else present when you noticed him when you
10 were on your break?

11 A. Yes, the manager.

12 Q. Who was that?

13 A. Clayton Gerlach.

14 Q. Can you tell us what you observed this individual do, if
15 anything?

16 A. He walked by the bank, the bank door, and then around to
17 the front.

18 Q. What, if anything, did you do after you observed this?

19 A. Well, I left the back of the lunch room and went back into
20 my teller line. I spoke with my boss, you know, that I
21 had seen someone suspicious walking around the back of the
22 bank.

23 Q. Did you have occasion to see this same individual again at
24 any time after that?

25 A. Yes, when I returned back to my cage.

1 Q. Where did you observe him at this time?

2 A. On Hertel, around the front of the bank.

3 Q. What was he doing at this time when you observed him?

4 A. He was walking by, he looked into the bank as if he were
5 looking at the clock.

6 Q. About how long were you able to see him during this time
7 when he was in the front of the bank on the Hertel side?

8 A. About two minutes, it wasn't very long.

9 Q. Was this the same individual that you observed when you
10 were on your break on the Parkside or the rear portion of
11 the bank?

12 A. Yes, it was.

13 Q. Was he dressed in the same way?

14 A. Yes.

15 Q. Now, can you tell us, Miss Johnson, does your bank have
16 individual teller lines for each cage or is there what is
17 known as an express line?

18 A. We have an express line.

19 Q. Is that the system whereby all the tellers -- all the
20 customers get in one line and go to an open window?

21 A. Yes.

22 Q. Did there come a time when you returned to your cage when
23 an individual came to the front of the express line?

24 A. Yes.

25 Q. Can you tell us, as best you recall, what happened during

1 that time?

2 A. He came through the front door, across the front of the
3 tellers line and stood behind a customer that I was waiting
4 on.

5 Q. Were there other people in the express line waiting for an
6 open window?

7 A. Yes.

8 Q. Did he wait in the line?

9 A. No.

10 Q. Now, can you describe this individual?

11 A. Yes, he was about five five, five six, medium, he had a
12 bush.

13 Q. How was he dressed, if you can remember?

14 A. Gray felt hat and a black leather coat.

15 Q. Was this the same individual you had seen in the rear of
16 the bank and standing in front?

17 A. No, it wasn't.

18 Q. It was a different individual?

19 A. Yes.

20 Q. What did this individual do after he walked to the front of
21 the express line?

22 A. He stood behind a customer that I was taking care of.

23 Q. He stood in front of your window?

24 A. Yes.

25 Q. What happened then?

1 A. The head teller asked him to get in line, the express
2 line.

3 Q. Then what happened?

4 A. Well, about a few minutes after that she opened up and she
5 asked him could she help him?

6 Q. What did he do?

7 A. He proceeded to her window.

8 Q. What did you do at this time?

9 A. Well, I was taking care of a customer, I was opening up
10 an Christmas Club, I was on the other side of the bank.

11 Q. Did there come a time when you were aware that there was
12 something unusual going on in the bank?

13 A. When he came in he had his hand like in his coat.

14 Q. This is the individual in the gray hat and the black coat?

15 A. Yes.

16 Q. Did you see him leave the bank?

17 A. No, I didn't.

18 Q. When were you first aware that something had happened in
19 the bank?

20 A. I was returning back to my cage to give the customer his
21 coupon book.

22 Q. What did you find out had happened?

23 A. One of the tellers had a note slipped to her.

24 Q. Was this individual still in the bank when you found out
25 about the note?

1 A. No, he was not.

2 Q. Did you observe the other individual in the black hat and
3 the black coat in the area?

4 A. No, not after I returned.

5 Q. Now, did there come a time when a number of police cars
6 and law enforcement people came to the bank?

7 A. Yes, about thirty, forty minutes later.

8 Q. Did there also come a time when some individuals were
9 brought back to the bank for viewing?

10 A. Yes.

11 Q. About how long -- between the time when you became aware
12 that a note had been slipped to the teller, about how long
13 in time from that point until some suspects or people were
14 brought back?

15 A. About thirty minutes.

16 Q. About thirty minutes?

17 A. Yes.

18 Q. Now, can you tell us where you were when the individuals
19 were brought back?

20 A. I was still in my cage with an FBI agent.

21 Q. Do you recall who the agent was?

22 A. I don't remember his name offhand.

23 Q. Can you remember exactly what happened when these individuals
24 were brought back to the bank, as best you recall?

25 A. They brought them in through the front of the bank, at the

1 door they had them line up.

2 Q. About how many were there, if you recall?

3 A. There were four.

4 Q. Okay. What happened after they had them line up?

5 A. The hat that one of the customers found they placed on each
6 individual, you know, to see if it fitted him, I guess.

7 Q. Each of the four individuals had a hat on his head at one
8 time or another?

9 A. Yes.

10 Q. How far away from you -- how far away from them were you
11 when they were standing in the line?

12 A. I guess to the swinging doors again, about that far.

13 Q. About that far in the bank?

14 A. Yes.

15 Q. When the men were brought in do you recall the FBI agent next
16 to you saying anything to you?

17 A. Yes.

18 Q. Can you tell us, as best you recall, what he said?

19 A. He asked me did any of the gentlemen look familiar that
20 were either on the inside or outside of the bank.

21 MR. GRASHOW: I couldn't hear the answer.

22 THE COURT: Read the answer.

23

24 (Thereupon the last answer was read by
25 reporter.)

1 BY MR. FRONK:

2 Q. Now, did you then examine each of the individuals as each
3 of them put the hat on?

4 A. Yes, I did.

5 Q. Were they wearing handcuffs when you examined them or
6 looked at them?

7 A. I don't remember seeing any handcuffs.

8 Q. Do you remember any one of the four being singled out for
9 any special treatment as you were observing them?

10 MR. BAKER: I object to the leading, your Honor.

11 THE WITNESS: No, I don't.

12 MR. BAKER: I object to the leading.

13 THE COURT: No, overruled.

14 BY MR. FRONK:

15 Q. Were you able to identify any one of the four as any of
16 the individuals that you had seen?

17 A. Yes, I did.

18 Q. Now, can you tell us how many you were able to identify?

19 A. The two, the one from the outside and the one from the
20 inside.

21 Q. You were able to identify -- out of the four individuals
22 that were standing in front of you, you were able to find
23 two of them that you had seen in the last half hour?

24 A. Yes.

25 Q. One who had been inside the bank, and one who had been

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1 outside?

2 A. Yes.

3 Q. Were the individuals -- strike that. Was the individual
4 who you had observed outside the bank, was he attired in
5 the same way when you picked him out from the lineup?

6 A. No, he was not.

7 Q. How was he different?

8 A. He didn't have a hat and coat.

9 Q. He didn't have a black leather coat on?

10 A. No.

11 Q. The individual whom you had observed come to the front of
12 the teller line inside the bank, how was he attired when
13 you picked him out in the lineup?

14 A. He had the leather coat on.

15 Q. Did he have his hat on?

16 A. No.

17 Q. Did anyone say anything to you, any of the agents say
18 anything to you as you were examining the men and looking
19 at them during this lineup?

20 A. No more than the information that I put down on my bandit
21 report, that is all.

22 Q. Your bandit report?

23 A. Yes.

24 Q. That consisted of the general description that you have
25 previously given us?

1 A. Yes.

2 MR. FRONK: I have no further questions.

3

4 CROSS EXAMINATION BY MR. BAKER:

5 Q. Miss Johnson, what time did you take your break that day?

6 A. It was about five to ten, around there.

7 Q. How long is your break?

8 A. Ten minutes.

9 Q. And you were sitting in the back room of the bank, is that
10 correct?

11 A. Yes.

12 Q. And you happened to look out the door, is that correct?

13 A. Yes.

14 Q. And you saw an individual walking on Parkside Avenue?

15 A. Yes.

16 Q. He was walking on the sidewalk?

17 A. Yes, he was.

18 Q. He had a coat on?

19 A. Yes.

20 Q. It wasn't unusual to have a coat on in November, was it?

21 A. No.

22 Q. He had a hat on?

23 A. Yes.

24 Q. It is not unusual to have a hat on in November, is it?

25 A. No.

1 Q. He was black, is that correct?

2 A. Yes.

3 Q. And you have seen black people in the neighborhood before,
4 have you not?

5 A. Yes, I have.

6 Q. He wasn't running, was he?

7 A. No, he was casually walking by.

8 Q. You thought it was suspicious?

9 A. Yes.

10 Q. Now, how far is your seat from the door you looked out of?

11 A. To the swinging doors over there.

12 Q. Okay. Let me go through that again. You were seated, were
13 you, at a table in the bank?

14 A. Yes.

15 Q. How far was your seat in the bank from the first door
16 you looked through?

17 A. Oh, to the corner of the table where Mr. Fronk is sitting.

18 Q. Indicating this?

19 A. The far corner.

20 Q. Indicating about twenty feet, is that fair?

21 THE COURT: Twenty to twenty five.

22 BY MR. BAKER:

23 Q. Twenty to twenty five feet, is that a fair distance?

24 A. Yes.

25 Q. You also have to look through in that bank, do you not, two

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- 1 doors?
- 2 A. Yes.
- 3 Q. Are those both glass doors?
- 4 A. Yes.
- 5 Q. Both full glass doors?
- 6 A. Yes.
- 7 Q. And these doors are separated by a distance, are they not,
- 8 about ten feet maybe?
- 9 A. Yes.
- 10 Q. Now, as you look out the door you don't look onto the
- 11 sidewalk, do you?
- 12 A. Yes, you can see the sidewalk from the door.
- 13 Q. You can see the sidewalk, but the sidewalk is not right
- 14 next to the door, is it?
- 15 A. Yes, it runs right up to the door.
- 16 Q. The Parkside sidewalk?
- 17 A. No, it is a distance from the door, yes.
- 18 Q. And in fact that area between the door and the sidewalk is
- 19 sometimes used as a parking area at your bank, is it not?
- 20 A. Yes.
- 21 Q. Were there any cars parked there that day?
- 22 A. Yes, there was one car parked there.
- 23 Q. Was it parked in front of the door or near the door?
- 24 A. Parked like on the side of the door.
- 25 Q. That was the only car parked there?

- 1 A. Yes.
- 2 Q. Is that correct?
- 3 A. Yes.
- 4 Q. Now, when he walked by he didn't stop, did he?
- 5 A. No.
- 6 Q. Just walked by, so you only saw him for a moment, is that
- 7 correct?
- 8 A. Yes, he was walking by.
- 9 Q. Is it fair to say that you only saw him about three or four
- 10 seconds at the most?
- 11 A. Yes.
- 12 Q. You went about your business after that, whatever you were
- 13 doing?
- 14 A. No, I was speaking with my manager. I told him I saw
- 15 someone suspicious walking along the side of the bank.
- 16 Q. After you told your manager had that individual gone by the
- 17 door?
- 18 A. Yes.
- 19 Q. Now, I believe when you testified at a preliminary hearing
- 20 the distance from where you were in the bank to where that
- 21 individual was on the sidewalk was about one hundred fifty
- 22 feet, is that fair to say?
- 23 A. Yes.
- 24 Q. Did this individual have a hat on?
- 25 A. Yes, he did.

1 Q. Was this a black hat?

2 A. Yes.

3 Q. When was the next time you saw this individual?

4 A. As I was leaving from the lunch room, going back to my
5 teller cage, he was coming across the Hertel side of the
6 bank.

7 Q. Just walking?

8 A. Yes.

9 Q. Did he walk by the whole bank there?

10 A. Yes, he walked all the way around the bank.

11 Q. In the front -- you have windows in the front?

12 A. Yes.

13 Q. You have signs in your windows, do you not, paper signs,
14 kind of bank advertising?

15 A. Yes.

16 THE COURT: Wait a minute, one at a time.

17 BY MR. BAKER:

18 Q. Paper signs which are poster like signs indicating bank
19 advertising?

20 A. Yes.

21 Q. Those are pasted on your front windows, are they not?

22 A. Yes.

23 Q. So they to a certain extent would obstruct your view, would
24 they not?

25 A. Somewhat.

1 Q. You can see people on Hartel Avenue but the signs are there
2 on the window and they affect your ability to look straight
3 through the glass, do they not?

4 A. Partially. It all depends like what advertisement, how
5 many signs are in the window. Most of the time there is
6 two.

7 Q. How many were there that day?

8 A. I don't remember. I don't think there was any up there
9 that day.

10 Q. Do you know what was there or not?

11 A. No, I'm not sure.

12 Q. It is your practice to put signs in your windows for
13 advertising?

14 A. Yes.

15 Q. Did you go back to work then at your tellers cage?

16 A. Yes.

17 Q. How long did you work before you saw this individual come
18 across the front of the tellers cages?

19 A. About five minutes.

20 Q. And that individual is different from the individual you
21 saw outside?

22 A. Yes.

23 Q. Now, that would have been about what time?

24 A. About ten after ten.

25 Q. When you first saw this individual coming across and getting

1 behind your customer -- is that what happened?

2 A. Yes.

3 Q. You were waiting on a customer at that point, were you not?

4 A. Yes, I was.

5 Q. Did you say you were taking care of a Christmas Club?

6 A. Yes.

7 Q. The man, your customer, was paying on the Christmas Club?

8 A. Yes, he was.

9 Q. When did you first notice this individual who cut across
10 the teller line, when he was behind your customer or before
11 that?

12 A. He was -- just before he was going behind the customer.

13 Q. Right about as he got to your window?

14 A. Yes.

15 Q. And did you tell him anything at that time?

16 A. No.

17 Q. Now, at that point this individual had not gone through
18 the express line, is that fair to say?

19 A. Yes.

20 Q. Were there any other people in the express line?

21 A. Yes, there was.

22 Q. Do you know how many?

23 A. About three or four.

24 Q. You continued to take care of your customer, finish your
25 customer off?

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1 A. Yes.

2 Q. And did you say anything to this individual at that point?

3 A. No, because when I finished with my customer I had my
4 closed sign up.

5 Q. Then the other teller said she would take care of him?

6 A. Yes.

7 Q. This was before you were finished with your customer?

8 A. Yes.

9 Q. As that person came behind your customer, you paid attention
10 to what you were doing, did you not, taking care of your
11 transaction?

12 A. Yes.

13 Q. You were not paying attention to that individual, were you?

14 A. Yes, I was.

15 Q. You looked at him?

16 A. I looked at him.

17 Q. You had to take your eyes off him to do your work, did you
18 not?

19 A. Yes, I did.

20 Q. And the next time you looked up when your customer left,
21 that individual was with the other teller, is that correct?

22 A. Yes.

23 Q. Did you look at the individual at that point?

24 A. No.

25 Q. So the only time you saw that individual was when he came

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1 behind your customer?

2 A. Yes.

3 Q. And after your customer left did you carry on some bank
4 business?

5 A. Well, he left, then he returned, and when he returned I
6 was opening up the Christmas Club.

7 Q. What I am saying is that your customer left, okay, then
8 he returned, you took care of bank business, your own
9 tellers business, not paying attention to what the other
10 teller was doing?

11 A. Yes.

12 Q. And consequently you were not paying attention to who your
13 other teller was waiting on?

14 A. No, I was not.

15 Q. Did you note how this individual was dressed?

16 A. He had a black leather coat and a gray hat.

17 Q. Could you describe the hat for me?

18 A. Gray felt hat, wide brim.

19 Q. It was sitting on his head?

20 A. Yes.

21 Q. Covering a portion of his forehead?

22 A. Yes.

23 Q. And you have described this individual as five feet five
24 inches tall?

25 A. Yes.

- 1 Q. And can you give me a weight on him?
- 2 A. About one hundred sixty.
- 3 Q. What about an age?
- 4 A. I think I put down twenty three, twenty four, I'm not sure.
- 5 Q. This individual, your opportunity to look at him and the
- 6 amount of time you spent looking at him, is it fair to say,
- 7 was about five seconds or so?
- 8 A. It was a little longer.
- 9 Q. How long?
- 10 A. I saw him as he was entering the bank.
- 11 Q. You saw him as he was entering the bank?
- 12 A. Yes.
- 13 Q. Did you have a customer at that point?
- 14 A. A customer was just coming to my window.
- 15 Q. You looked up and you saw somebody come into the bank?
- 16 A. Yes.
- 17 Q. How far away from you was this individual at that time?
- 18 A. To the swinging doors.
- 19 Q. You are describing the first swinging doors?
- 20 A. Yes.
- 21 Q. And is it fair to say that is approximately fifty feet?
- 22 A. I don't know.
- 23 Q. Did you then go on to your business with your customer?
- 24 A. Yes.
- 25 Q. Then the next time you saw him was when he came behind your

1 customer?

2 A. Yes.

3 Q. When was the first time that you learned that something
4 occurred in this bank?

5 A. After I returned back with the Christmas Club coupon book.

6 Q. Who told you?

7 A. One of the girls in the office, I don't remember who it
8 was.

9 Q. Did you see this individual leave the bank?

10 A. No, I didn't.

11 Q. When did the police get to the bank?

12 A. About thirty, forty minutes later.

13 Q. Were there lots of police there?

14 A. Maybe about four, about four.

15 Q. Four cars or four people?

16 A. Four policemen.

17 Q. What about FBI agents?

18 A. There was a lot of them.

19 Q. There were a lot of them?

20 A. Yes.

21 Q. Maybe about four policemen?

22 A. Yes.

23 Q. Did you talk immediately to the FBI agents?

24 A. No, I didn't.

25 Q. Do you know who you talked to?

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1 A. No. I know him when I see him, I don't know his name.

2 Q. You did talk to an FBI agent that morning?

3 A. Yes.

4 Q. This was before the people were brought back to the bank?

5 A. No, this was after they were brought back.

6 Q. After they were brought back you talked to an FBI agent?

7 A. Yes.

8 Q. Did he ask you to give a description of the individuals
9 you said you could identify?

10 A. I had to give a statement, yes.

11 Q. You did give a statement?

12 A. Yes, I did.

13 Q. Did you describe those individuals in that statement?

14 A. Yes, I did.

15 Q. Did you sign the statement?

16 A. I don't think so.

17 Q. When you say "statement," did you give an oral statement or
18 a written statement?

19 A. It was -- from me, oral.

20 Q. You didn't write it down?

21 A. No.

22 Q. Now, about a half hour after this occurred some individuals
23 were brought back to the bank, were they not?

24 A. Yes.

25 Q. Now, the individual you saw in the bank, he was also a black

1 individual, was he not.

2 A. Yes, he was.

3 Q. And the individuals that were brought back to the bank, they
4 were also black, were they not?

5 A. Yes, they were.

6 Q. How many of these individuals?

7 A. All told it was four.

8 Q. Where were you standing when these people were brought
9 into the bank?

10 A. I was in my teller cage with an FBI agent.

11 Q. So at this time you were talking to an FBI agent when they
12 were brought back in?

13 A. Yes.

14 Q. Did he tell you they were going to be brought in?

15 A. Yes, he did.

16 Q. The FBI agent told you that some people who they felt were
17 suspects or robbed the bank were going to be brought in?

18 A. Yes.

19 Q. That is what he told you, is that correct?

20 A. Yes.

21 Q. When these people were brought back to the bank or as they
22 were brought into the bank, you knew from what you were
23 told that they were suspects in this bank robbery that
24 occurred, did you not?

25 A. Yes.

1 Q. Were they brought in by the police?

2 A. Yes, they were.

3 Q. Do you recall if they were handcuffed or not?

4 A. No, I can't remember seeing any handcuffs.

5 Q. It is your testimony you can't remember seeing any handcuffs --

6 A. No, I don't know for sure if they were --

7 THE COURT: One at a time.

8 THE WITNESS: I don't know for sure if they were or not.

9 BY MR. BAKER:

10 Q. So if you saw a picture at a later date with some individuals
11 handcuffed, you would accept that picture of the scene as
12 it was that day, is that correct?

13 A. Yes.

14 Q. When the people were brought into the bank were they separated
15 or kept together?

16 A. They were kept together.

17 Q. Kept in a line?

18 A. Yes.

19 Q. Were they asked to sit down or stand up?

20 A. I didn't see that. I saw them standing up.

21 Q. They remained standing, as far as what you saw?

22 A. Yes.

23 Q. What did the FBI agent ask you to do at that point?

24 A. He was just asking me about my statement, and asked could
25 I identify any of the guys they brought back.

1 Q. Did you see anybody identifying those individuals in the
2 bank that day?

3 A. I really wasn't paying attention to the other people in
4 the bank.

5 Q. Is it your testimony then that you didn't hear anybody or
6 see anybody pick out any of these individuals?

7 A. No, I didn't.

8 Q. When they were in -- you said they were asked to put on a
9 hat or -- before you identified them did somebody pass the
10 hat to each one of them and ask them to place the hat on
11 their head?

12 A. They didn't place the hat themselves, the policemen I guess
13 put the hat on or the FBI agent.

14 Q. They didn't do it themselves, either a policeman or an
15 FBI agent put the hat on their head?

16 A. Yes.

17 Q. Did he move from individual to individual?

18 A. Yes, he did.

19 Q. How were these people dressed?

20 A. They all had shirts, pants, one had a sport coat on, one
21 had a leather coat.

22 Q. Only one had a -- what color leather coat?

23 A. Black.

24 Q. Full length or --

25 A. Three quarter length.

1 Q. Now, was the coat one of the coats that you saw earlier
2 that day?

3 A. It looked like one of the coat .

4 Q. You used that to help you in your identification?

5 A. Yes.

6 Q. What about the hat, was the hat one of the hats you saw
7 earlier that day?

8 A. Yes, the gray hat.

9 Q. That was the gray hat?

10 A. Yes.

11 Q. Now, the person inside the bank had the gray hat?

12 A. Yes.

13 Q. And the putting of this hat on, that helped you in identifying,
14 did it not?

15 A. Not really.

16 Q. Didn't seeing the hat on the individual --

17 A. When he first came into the bank --

18 Q. I am talking about now at the bank, when they brought the
19 people back for you to look at.

20 A. I had already identified him before they put the hat on
21 him.

22 Q. You made an identification before he put the hat on?

23 A. Yes.

24 Q. Did you make one or two identifications before he put the
25 hat on?

- 1 A. Yes.
- 2 Q. Who was the first one you picked?
- 3 A. If I can recall, it was -- they had them in a line, the two
- 4 on the left of the line of four.
- 5 Q. Well, there were two people you saw that day, one outside
- 6 the bank and one inside the bank?
- 7 A. Yes.
- 8 Q. Who did you pick out first, the one outside the bank or the
- 9 one inside the bank?
- 10 A. I picked them both out at one time.
- 11 Q. What did you say, 'Those two?'
- 12 A. Yes, the two on the far left.
- 13 Q. They were standing next to each other?
- 14 A. Yes.
- 15 Q. Did you tell them -- did you mention anything about the
- 16 coat, the one with the coat on?
- 17 A. Yes, I did.
- 18 Q. What did you tell the person?
- 19 A. The one who was on the outside, he didn't have the coat
- 20 on, the one on the inside had the coat on.
- 21 Q. So at that point in talking to the FBI agent you used the
- 22 coat to distinguish who was on the inside and who was on
- 23 the outside?
- 24 A. No, I didn't. It was in my statement.
- 25 Q. Was that the only hat they passed around, only one hat?

1 A. The only one I can remember.

2 Q. Do you see any of those individuals in the courtroom today?

3 A. Pardon me?

4 Q. Do you see any of the people that you identified at the
5 bank who were in the bank, in the courtroom today?

6 A. Yes.

7 Q. Could you identify them for me, could you tell me who they
8 are?

9 A. The two over there, sitting over there.

10 Q. You have identified two individuals at that table?

11 A. Yes.

12 Q. Which one was on the outside of the bank?

13 MR. FRONK: Your Honor, could we have them stand so she
14 can see them?

15 THE COURT: She hasn't said she needs to have them stand.
16 If she does, we will have them stand.

17 BY MR. BAKER:

18 Q. You have identified two people, you can see them?

19 A. Yes.

20 Q. Could you tell me which one was on the outside of the bank?

21 A. The one to the right of me was on the outside, and the one
22 to the left was on the inside.

23 Q. Could you tell us by what they are wearing?

24 A. Okay. The one with the brown leather jacket was on the
25 outside, and the one in the black shirt was on the inside.

1 Q. Did you have any opportunity to look at any pictures of
2 these individuals?

3 A. No, I haven't.

4 Q. Never seen a picture?

5 A. No.

6 Q. Did you talk to Mr. Fronk before you come in here today to
7 testify?

8 A. Yes.

9 Q. Did he tell you anything about these individuals?

10 A. No, he didn't.

11 Q. Did you talk about a description of these individuals with
12 him?

13 A. Yes.

14 Q. Did he ask you to describe them or did he give you a
15 description?

16 A. He didn't ask me to describe them or give a description.
17 I had already described them in my statement.

18 Q. Well, you just said prior to your testifying you talked
19 with Mr. Fronk about the description of these individuals.

20 A. That is as far as going through the part of identifying
21 them here in the courtroom today?

22 Q. What did you talk about identifying them in the courtroom
23 today?

24 A. Just, you know, that I wouldn't be identifying them.

25 Q. He told you he would not ask you to identify them?

77

1 A. Yes.

2 Q. Did you talk with anyone else?

3 A. No.

4 Q. Did you talk about whether or not they were in custody?

5 A. No.

6 Q. Did you talk about where they might be sitting in the
7 courtroom?

8 A. No, I didn't.

9 Q. Did you speak with Mr. Fronk during the recess we had here?

10 A. Yes, I did.

11 Q. Did you talk about identifying these individuals then?

12 A. No.

13 Q. Did you talk about your testimony at all during the recess?

14 A. No, I didn't.

15 MR. BAKER: I have nothing further.

16 THE COURT: Tell me, I was paying attention to something
17 else, which man did she indicate was inside?

18 MR. BAKER: Let the record reflect that the witness
19 identified the man in the black shirt as the
20 man on the inside, the man in the leather
21 jacket as the man on the outside.

22
23 CROSS EXAMINATION BY MR. DEMPSEY:

24 Q. Miss Johnson, how old are you?

25 A. Twenty six.

- 1 Q. Now, the gentleman on the outside of the bank that you
2 first saw, he was a hundred fifty feet away from you when
3 you first saw him, is that correct?
- 4 A. Yes.
- 5 Q. You saw him for about five seconds at that time?
- 6 A. Yes, as he was walking by.
- 7 Q. He was a hundred and fifty feet away?
- 8 A. Yes.
- 9 Q. And you had to look through two closed glass doors, is
10 that correct?
- 11 A. Yes.
- 12 Q. Did those doors have any signs on them?
- 13 A. Yes, small signs.
- 14 Q. And are they on both doors, the signs?
- 15 A. I can't recall.
- 16 Q. And I asked you when we had our last hearing to describe
17 the gentleman outside, and what is your best recollection
18 as to the length of his coat?
- 19 A. A three quarter length coat.
- 20 Q. Does that mean down to the middle of his calves?
- 21 A. Yes, just below the knee.
- 22 Q. Okay. So he had a coat on from his collar, is that correct?
- 23 A. Yes.
- 24 Q. All the way down to the middle of his calves, is that
25 correct?

1 A. Yes.

2 Q. And did you notice what kind of shoes he had on?

3 A. No.

4 Q. Do you know what color pants he had on at that time?

5 A. No.

6 Q. And do you know -- well, he also had a hat on, is that
7 correct?

8 A. Yes, he did.

9 Q. The hat was pulled down, wasn't it, tilted on one side?

10 A. Yes, it was.

11 Q. And it was tilted to the right, wasn't it?

12 A. I can't remember.

13 Q. It was either tilted to the left or right, one or the
14 other?

15 A. Yes.

16 Q. And do you know if he had a beard on or not?

17 A. He didn't have a beard.

18 Q. Do you remember saying last time that you didn't know
19 whether he had a beard or not, one way or the other?

20 A. No I don't.

21 Q. Could you have said that last time?

22 A. I don't think so.

23 Q. You're not sure?

24 A. I don't think I said he had a beard.

25 Q. Do you know if he had sunglasses?

- 1 A. Yes, he had glasses on, they were tinted glasses.
- 2 Q. And the tinted glasses, were they sort of rose colored?
- 3 A. No, they were more dark.
- 4 Q. They were sunglasses, is that correct?
- 5 A. Well, either sunglasses or prescriptioned glasses, I don't
- 6 know.
- 7 Q. In any event, they were dark glasses?
- 8 A. Yes.
- 9 Q. You could not tell the color of his eyes, could you?
- 10 A. No, I could not.
- 11 Q. You couldn't see his eyes, could you?
- 12 A. No, not very well.
- 13 Q. From one hundred fifty feet away, through sunglasses, you
- 14 couldn't see them?
- 15 A. No.
- 16 Q. So that the only view you got of the fellow outside for
- 17 the five seconds was from his nose to his chin, is that
- 18 correct, as far as facial features?
- 19 A. Yes.
- 20 Q. You again saw him in the front, is that correct?
- 21 A. Yes.
- 22 Q. How many seconds did you see him in the front?
- 23 A. Well, from the time he was walking around the front of the
- 24 building.
- 25 Q. While he was walking around in front, you were walking out

1 to your cage?

2 A. Yes.

3 Q. Would it be fair to say you saw him another two or three
4 seconds when he was in front of the bank?

5 A. Yes.

6 Q. For a total then you saw him about five to seven seconds,
7 would that be fair?

8 A. Yes.

9 Q. When the gentlemen were brought into the bank thirty minutes
10 to forty five minutes after the alleged holdup, were any
11 others, other than the four black men, brought in?

12 A. No.

13 Q. Were the four black men sitting alone or standing alone,
14 sort of segregated, aside?

15 A. They were side by side.

16 Q. Now, do you remember testifying about a month ago down in
17 Magistrate Maxwell's courtroom?

18 A. Yes, I do.

19 Q. And do you remember me at that time asking you if you
20 could identify anyone in the courtroom?

21 A. Someone did, I don't remember who asked me.

22 Q. What was your response at that time?

23 A. I couldn't identify anyone.

24 Q. And today though you can identify people, is that correct?

25 A. Yes.

1 Q. Okay. What happened in the meantime to change your mind?

2 A. Well, at that time I couldn't, you know, see who they were,
3 I guess, because of the change of dress when I saw them
4 inside the bank.

5 Q. What do you mean by that?

6 A. Because like when he was on the inside of the bank -- when
7 they brought them back for us to identify, he had different
8 clothes.

9 Q. Different clothes than what?

10 A. Than he did the day he was in the courtroom.

11 Q. Does he have the same clothes on today that he did when
12 he supposedly robbed the bank?

13 A. No, he doesn't have the clothes on today that I saw him in
14 at the bank.

15 Q. So then it is his clothes today that makes you more certain?

16 A. I can see him a lot better here.

17 Q. When they asked you that question down in the other court-
18 room did you say that you could not see him adequately?

19 A. No, I didn't.

20 Q. You stated though after looking at them that you could not
21 identify them, is that correct?

22 A. Yes.

23 MR. DEMPSEY: Thank you very much.

24
25 CROSS EXAMINATION BY MR. GRASHOW:

1 Q. Miss Johnson, the room in the back where you have lunch, does
2 that serve any other function for the bank?

3 A. I don't understand your question.

4 Q. Anything else go on beside eating lunch in that room, is
5 it a place for the employees to check in and out of the
6 bank?

7 A. We hang our coats in the back. There might be some meetings
8 going on in the back, but that is in the room off the lunch
9 room.

10 Q. What else is in the lunch room?

11 A. A refrigerator, table, coffee machine and a cabinet.

12 Q. You were sitting at the table?

13 A. Yes, I was.

14 Q. Where is the table situated in that room?

15 A. It is right in line with the doors, the two double doors.

16 Q. Those doors, are those the doors that the employees go in
17 and out?

18 A. No, we use the front entrance.

19 Q. What are the doors used for?

20 A. I don't know.

21 Q. Have you ever seen anyone use them?

22 A. Yes, my boss goes out of them, goes to his car.

23 Q. Are those doors locked?

24 A. Yes, they are.

25 Q. At all times?

- 1 A. Yes.
- 2 Q. Do you have a key to the doors?
- 3 A. No, I don't.
- 4 Q. The table is in line with those doors?
- 5 A. Yes, it is.
- 6 Q. The center of the table?
- 7 A. Yes.
- 8 Q. So that the chairs would be on either side?
- 9 A. Yes.
- 10 Q. They would not be in line with the doors, is that correct?
- 11 A. You can see through the doors from the chair.
- 12 Q. Just sitting in the chair you would have to lean one way
- 13 or the other to look out the doors?
- 14 A. No.
- 15 Q. And when you say you saw somebody suspicious walking around
- 16 the back of the bank, when you say "the back of the bank,"
- 17 what you mean is on the Parkside side?
- 18 A. Yes.
- 19 Q. Which is a public street?
- 20 A. Yes.
- 21 Q. Not somebody creeping behind the back wall of the bank?
- 22 A. No.
- 23 Q. Now, you said when you were in the bank you had an FBI
- 24 agent near you?
- 25 A. Yes, when they brought the four men back in the bank.

1 Q. I think you stated you didn't know that person's name?

2 A. No, I didn't.

3 Q. Did you see him here today?

4 A. He's not here.

5 Q. He is in the court house today?

6 A. Yes.

7 Q. Do you remember what he is wearing today?

8 A. He's got a blue pullover sweater and white shirt.

9 Q. Now, how long did you spend with him when the four suspects
10 were brought in?

11 A. I think about five, ten minutes.

12 Q. What did you say to him?

13 A. He asked me questions and for my statement. I was giving
14 information, he was writing it down.

15 Q. What did you ask of him?

16 A. Nothing.

17 Q. You made no inquiry of him as to what happened?

18 A. No, I didn't.

19 Q. Do you know who Mr. Garwol is?

20 A. No.

21 Q. Do you know who the gentlexan was who came back -- strike
22 that. Do you know the gentleman who testified before you
23 today?

24 A. The first time I met him was here.

25 Q. Did you see him in the bank?

1 A. No, I didn't.

2 Q. You didn't see him at all in the bank while you were there?

3 A. No.

4 Q. Were you in the bank during the whole time the police were
5 there?

6 A. Yes, I was.

7 Q. Do you know about how many people were being asked to
8 identify these four people?

9 A. About six or seven.

10 Q. Were you watching those persons?

11 A. No, I was not.

12 Q. When you made your identification what did you do, how did
13 you make it?

14 A. Based on my vantage point.

15 Q. Physically, did you point?

16 A. Yes, I did.

17 Q. You did point?

18 A. Yes.

19 Q. And the other five people that were making identifications,
20 were they near you?

21 A. They were all in the same room, you know, they were -- some
22 near me, some were at different points.

23 Q. Anyone watching would have seen you point, is that correct?

24 A. Yes.

25 Q. Did you point twice?

- 1 A. No, I just pointed once.
- 2 Q. You identified two people, did you not?
- 3 A. Yes, but I stated the two to the far left of me.
- 4 Q. You said that out loud?
- 5 A. I said it to the FBI agent.
- 6 Q. Who else was listening, do you know?
- 7 A. No, I don't.
- 8 Q. How far away was the agent from you when you said it to
- 9 him?
- 10 A. He was directly behind me.
- 11 Q. Behind you?
- 12 A. Yes.
- 13 Q. Did you turn around and talk to him?
- 14 A. Yes.
- 15 Q. Now, you stated when you saw this person walking down
- 16 Parkside that he looked suspicious to you?
- 17 A. Yes.
- 18 Q. And then you saw another person come into the bank?
- 19 A. Yes.
- 20 Q. Did that person look suspicious to you also?
- 21 A. Yes.
- 22 Q. You were paying attention to these people?
- 23 A. Yes, I was.
- 24 Q. And the same time you were waiting on your customer, is
- 25 that correct?

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1 A. Yes.

2 Q. You were taking care of money transactions?

3 A. Yes, I was.

4 Q. Do you often watch people come into the bank?

5 A. Yes, I do.

6 Q. You are cognizant of the people that come into the bank?

7 A. Yes, I am.

8 Q. You didn't watch the other people who were picking out the
9 four suspects?

10 A. No.

11 Q. You were not watching them at all?

12 A. No.

13 Q. Those people you were not interested in?

14 A. No.

15 Q. Now, also at your bank are there any windows on the Park-
16 side side of the bank proper, not the lunch room, but the
17 physical part of the bank itself?

18 A. Yes, there is.

19 Q. How large is that window, if you recall?

20 A. I don't know.

21 Q. Well, I believe Mr. Baker asked you earlier whether or not
22 you keep signs on the front window, do you also keep signs
23 at the side window also?

24 A. No.

25 Q. There is no signs there at all?

89

1 A. No.

2 Q. Could you see out that window somebody walking around the
3 corner of the bank?

4 A. I can see the building next door.

5 Q. Could you see somebody walking around the corner on Parkside?

6 A. No, it is like -- it is on the Parkside side, it is between
7 the building on Hertel and, you know, back in the back.

8 Q. The person that you saw walking along Parkside, you said
9 you saw him walk onto Hertel, you didn't see him make the
10 turn, did you?

11 A. No, I didn't.

12 MR. GRASHOW: Thank you.

13
14 CROSS EXAMINATION BY MR. DOBSON:

15 Q. I believe you testified that both the individuals, the one
16 on the inside and the one on the outside, wore hats when
17 you saw them, is that correct?

18 A. Yes.

19 Q. You said one had a bush?

20 A. Yes, he did.

21 Q. That is a hairstyle?

22 A. Yes, it is, I guess you would call it that.

23 Q. What exactly is a bush?

24 A. The hair is a little longer, it is bushy.

25 Q. What do you mean by "a little longer," is that --

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1 A. It is not a close cut. The hair is, I would say, maybe
2 three, four inches long all the way around.

3 Q. The hair sticks out from the head three or four inches?

4 A. Yes.

5 Q. You also testified, I believe, that the FBI agent placed a
6 hat on each of the four individuals, I think you said to
7 see if the hat would fit him, do you remember saying that?

8 A. I guess that's what they were doing, I don't know.

9 Q. Did the hat fit any of the individuals?

10 A. I guess it fitted one, I couldn't remember. I just saw
11 them going through the process of putting the hat on the
12 head, that is all.

13 Q. Some of the individuals the hat fit, some of them it didn't.

14 A. Yes.

15 Q. If they could only fit one of these people?

16 A. I guess so, I don't know. I don't remember, I can't really
17 say.

18 Q. You don't recall which one of the individuals it was, do
19 you?

20 A. No.

21 MR. DOBSON: Thank you.

22
23 REDIRECT EXAMINATION BY MR. FRONK:

24 Q. I have just a couple of questions. Miss Johnson, just so
25 I understand what you have said. When you have been

1 describing the distance when you first observed the
2 individual outside in the lunch room, and I asked you how
3 far away he was in terms of distance in this courtroom,
4 can you give me something in here to determine about how
5 far he was? I mean when you first saw him from the lunch
6 room out on the sidewalk on Parkside?

7 A. That would be as far back as the second set of swinging
8 doors.

9 Q. And the second set of doors is the distance you are describing
10 as about one hundred and fifty feet?

11 A. Yes.

12 MR. FRONK: I have no further questions.

13 THE COURT: Thank you.

14
15 (Witness excused.)
16

17 THE COURT: We will be interrupting you for about ten
18 minutes. Mr. Handley and Mr. Cole are going
19 to be taken upstairs, and then they will be
20 brought back down at that time.
21

22 (Thereupon the court was in recess at 3:10 P.M.)
23

24 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT 3:30 P.M.
25

1 DOUGLAS F. MURDOCH, 308 Taunton Place,
2 Buffalo, New York, called as a witness on behalf of the Govern-
3 ment, and being first duly sworn, testified as follows:
4

5 DIRECT EXAMINATION BY MR. FRONK:

6 Q. Mr. Murdoch, by whom are you employed, sir?

7 A. General Motors, Chevrolet, Tonawanda, New York.

8 Q. Sir, directing your attention to the 26th day of November
9 1976, did you have occasion to be in the M & T Bank, Hertel-
10 Parkside Branch, on that day?

11 A. Yes, sir.

12 Q. Approximately what time would you have gone to the bank?

13 A. Sometime after eleven o'clock. I'm not sure of the time,
14 eleven o'clock or thereabouts.

15 Q. Now, can you tell us, sir, the nature of your business at
16 the bank on that day?

17 A. I want to cash a check and make a deposit.

18 Q. Sir, did there come a time when you were leaving the bank
19 when you had a collision with another customer?

20 A. Not a collision, no.

21 Q. Can you tell us what happened as you were leaving the bank,
22 sir?

23 A. Yes. I was about the third window up, and I went past the
24 other tellers windows, and I noticed a young man standing
25 in front of the first tellers window with his hand in his

1 coat thusly.

2 Q. You are indicating he had his hand tucked inside his coat?

3 A. Yes.

4 Q. Can you tell us what happened to you when you were in the
5 bank, what you observed?

6 A. Well, that is all I observed. I thought it was rather
7 suspicious, standing in such a position --

8 MR. BAKER: Objection, your Honor.

9 THE COURT: Overruled.

10 BY MR. FRONK:

11 Q. Did you then leave the bank?

12 A. I beg your pardon?

13 Q. What did you do after you observed this man?

14 A. Like I said, I thought it was suspicious, and I left the
15 bank. My car was across the street in Sunshine's parking
16 lot, and I presumed that there was going to be a problem.
17 I pulled my car around facing the bank and sat there and
18 waited further developments.

19 Q. What further developments, if any, did you observed from
20 your car?

21 A. In a few moments, a few seconds, a man came running out
22 of the bank, the same gentleman, and ran across Hertel
23 Avenue up toward Huntington, the other side of Hertel
24 Avenue. His hat flew off his head. I got -- my car was
25 running and I pulled right out of Sunshine's and followed

1 him to Huntington and pulled over close and I observed him
2 get into a car on Huntington.

3 Q. Now, at that time when you observed this individual run
4 out of the bank was he alone?

5 A. He was alone.

6 Q. Did you observe anyone else running with him in the area?

7 A. I did not.

8 Q. Did there come a time when you retrieved the hat, sir?

9 A. Then the car pulled away and I obtained the license number
10 and turned around and come back up to Hertel Avenue and
11 noticed the hat was still in the place where it had fallen
12 off, and I pulled my car right on Hertel in front of
13 Tronolone's gas station and went and picked the hat up and
14 walked into the bank.

15 Q. Sir, can you tell us, if you recall, the color or the model
16 of the automobile that you observed the individual get in?

17 A. I don't know what kind of car it was, I don't know the
18 make. It looked like a beige or light convertible to me.

19 Q. Now, what did you do with the hat, sir, when you returned
20 to the bank with it?

21 A. Put it on the desk in the bank and informed them that that
22 was the hat that this young man had lost, and told the
23 police that when they arrived.

24 Q. Did a number of police arrive at the bank shortly thereafter?

25 A. Yes.

1 Q. Did there come a time when you were at the bank, sir, when
2 certain individuals were brought back to the bank for
3 viewing?

4 A. Yes, I was there.

5 Q. About how long was it after you returned to the bank with
6 the hat when the individuals were brought back for viewing?

7 A. I would think about thirty minutes or thereabouts.

8 Q. Okay. Can you tell us, as best you recall, the procedures
9 that were followed when these individuals were brought to
10 the bank for viewing?

11 A. I was talking to a detective when they were brought in,
12 and I just saw them. As a matter of fact, they brought me
13 over around when they had them lined up.

14 Q. Now, were they in a straight line?

15 A. In a straight line.

16 Q. How many of them were there, if you recall?

17 A. Four.

18 Q. Where in the bank were they standing, approximately, when
19 they were in this line?

20 A. Oh, that would be up to the left hand side of the door
21 going out.

22 Q. About how far away from you?

23 THE COURT: What do you mean, the low swinging doors or
24 the main door?

25 THE WITNESS: The main door.

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BY MR. FRONK:

Q. Approximately how far away were you from the four of them when you were observing them as they stood in this line?

A. About ten, twelve feet --

Q. Now --

A. -- behind them.

Q. Do you recall when you first observed the gentleman in the bank and observed the gentleman run from the bank, did you observe any of the apparel he had on at that time?

A. My statement was that he wore a dark coat and a hat, a light felt hat.

Q. When the individuals were returned to the bank and there were four of them standing in front of you, were you able to identify anyone as being someone you had seen?

A. At that time I identified one man.

Q. That was the man whom you had seen in the bank?

A. That was the man I had seen in the bank.

Q. Was that the same man you had seen run by your car when his hat flew off?

A. I thought it was.

Q. Do you recall what, if anything, the officer said to you when the individuals were brought back to the bank?

A. No, not really. He asked me if I could identify them. I don't remember verbatim what was said to me.

Q. Was there any one or more of the individuals singled out

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1 for special kind of treatment when they were brought back?

2 A. No.

3 MR. FRONK: I have no further questions.

4
5 CROSS EXAMINATION BY MR. BAKER:

6 Q. Mr. Murdoch, how long had you been in the bank that morning?

7 A. About five minutes.

8 Q. This is the bank you usually do your banking at?

9 A. Yes.

10 Q. You were parked in the parking lot across the street, Sun-
11 shine's parking lot?

12 A. Yes.

13 Q. Now, when first did you see this individual?

14 A. As I was going out, away from the tellers cage.

15 Q. You were leaving the bank?

16 A. I was leaving the bank.

17 Q. You had transacted your business?

18 A. I had.

19 Q. What was this individual doing?

20 A. Standing, waiting for the teller to -- I assume waiting for
21 the teller to take care of him.

22 Q. Well, when you say "waiting for the teller," was he waiting
23 in line?

24 A. No, he was next, there was nobody -- that person had just
25 left, he was next.

- 1 Q. He was next in line?
- 2 A. Yes.
- 3 Q. Do you know which teller he was at?
- 4 A. No, I couldn't say which one he was at.
- 5 Q. Had you seen this person before you started to leave the
- 6 bank?
- 7 A. No.
- 8 Q. And you said you thought it was strange that he had his
- 9 hand in his coat?
- 10 A. I thought it was strange, yes.
- 11 Q. He had his hand across his chest sort of?
- 12 A. Standing like this.
- 13 Q. Just like that?
- 14 A. Yes.
- 15 Q. At that point you had no reason to think anything strange
- 16 was occurring, did you?
- 17 A. I thought it was strange.
- 18 Q. No, I understand that, you thought it was strange --
- 19 A. Yes.
- 20 Q. -- with his hand in his coat, but other than that, there
- 21 was nothing to draw your attention to this individual?
- 22 A. No.
- 23 Q. Did you bump into this individual?
- 24 A. I just brushed him, I didn't bump him, just brushed him on
- 25 the way by, it was pretty close between him and the teller.

- 1 Q. Did you continue walking out of the bank then?
- 2 A. I did.
- 3 Q. You didn't turn around and look?
- 4 A. I didn't.
- 5 Q. The only time you saw him at that point in the bank was
- 6 when you walked by him?
- 7 A. That is right.
- 8 Q. And you observed him maybe a couple of seconds at that
- 9 point.
- 10 A. Not very long.
- 11 Q. A very short period of time, is that fair?
- 12 A. Just enough to walk by him and look at him.
- 13 Q. Then you continued on your way out?
- 14 A. I continued on my way out.
- 15 Q. That was the first and only time within that bank that
- 16 you saw him, is that correct?
- 17 A. That was the only time.
- 18 Q. When you got out did you go right to your car?
- 19 A. Yes.
- 20 Q. You decided to wait?
- 21 A. Yes.
- 22 Q. Did you think something was going to happen in the bank?
- 23 A. I did.
- 24 Q. Because he had his hand in his coat, right?
- 25 A. Yes.

- 1 Q. Was he the only black in the bank at that time, other than
2 bank employees?
- 3 A. I couldn't answer that.
- 4 Q. The fact that he was black, did that cause you any suspicion?
- 5 A. No.
- 6 Q. Just his hand in his jacket?
- 7 A. Just the way he was standing there, yes.
- 8 Q. What did you do with your car then?
- 9 A. I had it parked, I got in and pulled so it was facing the
10 bank, so I had a view of the bank.
- 11 Q. From within the parking lot?
- 12 A. From within the parking lot.
- 13 Q. You were facing the Parkside side of the bank?
- 14 A. The front door of the bank.
- 15 Q. You were in the corner portion of Sunshine's lot?
- 16 A. I was on the edge of Sunshine's lot by the driveway.
- 17 Q. By the front driveway right on Parkside near Hertel, is that
18 correct?
- 19 A. I pulled out on the Hertel driveway.
- 20 Q. You pulled out into the driveway, is that correct?
- 21 A. Pulled out of the driveway, over to Hertel, up to Parkside.
- 22 Q. You were on Parkside waiting?
- 23 A. Yes, either Parkside or Hertel, it is right on the corner.
- 24 Q. Were you outside of the parking lot at that time?
- 25 A. When he came out of the bank?

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1 Q. Let's go back. When you decided you were going to wait,
2 you got in your car and started your car, right?

3 A. Yes, I was facing the houses, so I pulled the car up so I
4 was facing the bank.

5 Q. In the parking lot?

6 A. In the parking lot.

7 Q. Right at the -- right as you go out of the parking lot?

8 A. As you go out of the parking lot.

9 Q. You are still in the parking lot at that time?

10 A. Yes, sir.

11 Q. And you see him come out of the bank?

12 A. Yes.

13 Q. What was he doing when he came out?

14 A. Running.

15 Q. Did he run out of the bank?

16 A. Yes.

17 Q. He was running, you were in your car, right?

18 A. I was.

19 Q. He was running alone?

20 A. He was running alone.

21 Q. Where did he run to?

22 A. He ran south on Parkside, I believe that is south, to
23 Huntington. When he started running across the street, I
24 started pulling my car out.

25 Q. What color was the light for Parkside at that point?

- 1 A. I couldn't tell you. I got across the street.
- 2 Q. Well, you went across the street?
- 3 A. I went across the street.
- 4 Q. Were any cars waiting at Hertel Avenue there?
- 5 A. No, I got -- there was nobody there, I got by.
- 6 Q. What I am asking you, the light -- that is a big intersection,
- 7 Parkside and Hertel?
- 8 A. Yes.
- 9 Q. You were on Parkside going south then, were you not?
- 10 A. Yes.
- 11 Q. You were on Parkside going south then, were you not?
- 12 A. Yes.
- 13 Q. And your testimony is that there were no cars waiting or
- 14 either going on Hertel Avenue, is that right?
- 15 A. Not at that time. I wasn't encumbered by any traffic.
- 16 Q. You didn't see any cars waiting?
- 17 A. No, I wasn't going to hit anybody, there was no cars.
- 18 Q. You followed this individual in your car?
- 19 A. Yes.
- 20 Q. How far did you follow him?
- 21 A. Up to the first block, Huntington.
- 22 Q. And you saw him from the time he left the bank until he got
- 23 to Huntington?
- 24 A. I did.
- 25 Q. And did he turn the corner?

- 1 A. He ran around the corner, the car was on the other side of
2 the corner.
- 3 Q. He was running alone all the time?
- 4 A. All I saw was the one man running.
- 5 Q. You say you saw him get into a car?
- 6 A. Yes.
- 7 Q. Where on Huntington did he get into a car?
- 8 A. Just as close to the corner as you can get almost.
- 9 Q. Did you make the turn on Huntington?
- 10 A. I did not.
- 11 Q. Did you stay close by there?
- 12 A. I slowly passed Huntington and took note of the license
13 number and pulled into a driveway farther up Parkside.
- 14 Q. Did you see that car take off?
- 15 A. I did.
- 16 Q. You were at Huntington long enough to see that car pull out
17 and take off?
- 18 A. Yes, that is right.
- 19 Q. What about the traffic conditions on Parkside where you
20 were?
- 21 A. Must have been rather light.
- 22 Q. Did you see anybody coming down Parkside and tear around
23 the corner on Huntington?
- 24 A. A car?
- 25 Q. Yes, a car.

- 1 A. No.
- 2 Q. Did you hear any screech of tires at Hertel and Parkside
- 3 while you were following this individual?
- 4 A. No.
- 5 Q. Did you then go down a little further and make a U-turn?
- 6 A. No, I pulled into a driveway.
- 7 Q. And turned around?
- 8 A. Yes.
- 9 Q. You really weren't off Parkside at all during that period
- 10 of time?
- 11 A. No, I wasn't.
- 12 Q. When you came back by Huntington did you see the car at all?
- 13 A. The car was gone, it was gone.
- 14 Q. Do you know how many individuals were in that car?
- 15 A. I do not.
- 16 Q. Did you give the police a description at all of the person
- 17 you saw?
- 18 A. Did I give a description?
- 19 Q. Yes.
- 20 A. At what time?
- 21 Q. Well, when you come back to the bank. You came back to the
- 22 bank with the hat, did you not?
- 23 A. Yes, I did.
- 24 Q. Did you see this person lose the hat?
- 25 A. Yes.

- 1 Q. Where was it lost again?
- 2 A. On the south side of Hertel and Parkside, opposite the
- 3 bank, across the street.
- 4 Q. Was it in the street or on the sidewalk?
- 5 A. It was in the curb.
- 6 Q. When you came back to the bank afterward did you give the
- 7 police a description?
- 8 A. During the questioning I told them what happened, and I
- 9 described the coat and the hat. That was the description
- 10 I gave the police.
- 11 Q. Did you give them any physical description as to height,
- 12 weight?
- 13 A. No. I told them he was tall and slim.
- 14 Q. Tall and slim, that is the best you could give?
- 15 A. That is the best I could give.
- 16 Q. You didn't see what kind of hair he had?
- 17 A. No.
- 18 Q. You couldn't see the color of his eyes?
- 19 A. No.
- 20 Q. You couldn't see what color pants he had on?
- 21 A. No.
- 22 Q. What about shoes?
- 23 A. No.
- 24 Q. The best you could do from what you saw that day was tall
- 25 and slim, and did you tell them the type of coat?

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- 1 A. Yes, I did.
- 2 Q. What type of coat?
- 3 A. I thought it was a three quarter length coat, dark.
- 4 Q. Was it black or just dark?
- 5 A. Dark brown or black, one or the other.
- 6 Q. When you got back to the bank were you asked to wait at
- 7 the bank and talk to the police?
- 8 A. I did wait, I wasn't specifically asked, they came by that
- 9 time.
- 10 Q. There were quite a few police there at that time?
- 11 A. There were a few.
- 12 Q. FBI agents?
- 13 A. And an FBI agent.
- 14 Q. Where were you standing in the bank after this all occurred?
- 15 A. Where the tellers normally are.
- 16 Q. Behind the counter?
- 17 A. Yes.
- 18 Q. Did there come a time when some people were brought into
- 19 the bank?
- 20 A. There was, yes.
- 21 Q. Were you talking to a police officer when this occurred?
- 22 A. When they were brought in I believe I was.
- 23 Q. When they were brought in were they brought in by police
- 24 officers or FBI agents?
- 25 A. I don't know who brought them in.

- 1 Q. Did you see who brought them in?
- 2 A. I just saw people bring them in, I don't know if they were
- 3 detectives or FBI men, I couldn't tell you.
- 4 Q. You saw them brought into the bank?
- 5 A. I noted them come in.
- 6 Q. Were they handcuffed?
- 7 A. I would say they were handcuffed.
- 8 Q. At that point were you told these were suspects in the
- 9 bank robbery?
- 10 A. No.
- 11 Q. You knew they were suspects?
- 12 A. I assumed they were.
- 13 Q. Right, because they had handcuffs on, they were under
- 14 arrest or appeared to you --
- 15 A. I don't know if they were under arrest.
- 16 MR. GRASHOW: I object to that.
- 17 BY MR. BAKER:
- 18 Q. Did they appear to be under arrest?
- 19 A. I wouldn't know whether they were under arrest. They were
- 20 brought into the bank.
- 21 Q. With handcuffs?
- 22 A. With handcuffs.
- 23 Q. How were they dressed at that point?
- 24 A. The four of them?
- 25 Q. Yes.

- 1 A. I couldn't tell you.
- 2 Q. Do you recall what they had on? I'm not asking for colors
- 3 but --
- 4 A. Just clothing, I couldn't tell you.
- 5 Q. Did any of them have any coats on?
- 6 A. That one young fellow had a coat on.
- 7 Q. There was one person with a coat on among the four?
- 8 A. I don't know that, whether there was one, two or three.
- 9 Q. What about hats, did any of them have a hat on?
- 10 A. To the best of my recollection, no.
- 11 Q. They were all black, were they not?
- 12 A. Yes.
- 13 Q. Were they made to stand separately in the bank?
- 14 A. No.
- 15 Q. They were not allowed to mingle with you, were they?
- 16 A. No. Separate from each other? They were standing next to
- 17 each other.
- 18 Q. They were standing together?
- 19 A. Yes.
- 20 Q. Were they standing in line?
- 21 A. Standing in a line.
- 22 Q. They were separated from you people, were they not?
- 23 A. They were up in the front of the bank.
- 24 Q. Did you see other people identifying these individuals?
- 25 A. No.

1 Q. You were asked to make an identification?

2 A. I was.

3 Q. Did you -- were they asked to put a hat on at all?

4 A. A hat was put on each head.

5 Q. This was put on by a police officer?

6 A. I assume it was a police officer.

7 Q. Did he go right down the line?

8 A. He did.

9 Q. Then you were asked if you could pick somebody out?

10 A. Yes.

11 Q. Did you pick somebody out?

12 A. I did.

13 Q. At that point?

14 A. I did.

15 Q. The hat that was placed upon their heads, was that the hat
16 you picked up?

17 A. To the best of my knowledge, it was.

18 Q. It was gray?

19 A. Yes.

20 Q. You didn't make an identification before the hat was put
21 on, did you?

22 A. I don't think I did.

23 Q. Your identification was made after the hat was placed upon
24 their heads, is that correct?

25 A. I think so. To the best of my knowledge, yes.

1 Q. Now, placing the hat on their heads, that helped you in
2 making this identification?

3 A. I'm sure it did because when he went by me he had a hat on
4 his head.

5 Q. The fact that he had a coat on still at this time in the
6 bank, that helped it making --

7 A. I identified the man with the coat.

8 Q. Were you told by the police who you identified?

9 A. No.

10 Q. Did you identify more than one or just one?

11 A. Just one.

12 Q. Do you recall where he was standing in line?

13 A. I think he was the second one from the left.

14 Q. After that occasion have you been asked to look at any
15 pictures of any individuals?

16 A. I have not.

17 Q. Did you give a statement to the FBI?

18 A. That day.

19 Q. Did you sign the statement?

20 A. Yes.

21 Q. You gave a signed statement to the FBI?

22 A. I think I gave a signed statement to the FBI.

23 Q. Did you review your testimony with Mr. Frank before you
24 come in here at any time today?

25 A. No.

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1 Q. Did you read those statements over?

2 A. Only on November 26th.

3 Q. You read it over on November 26th and signed it, right?

4 A. Right.

5 Q. Do you see that individual in the courtroom today whom you
6 identified November 26th?

7 A. First, you are in the way, I can't see anything.

8 Q. Just look around.

9 A. Can they stand up?

10 Q. Why don't you stand up and look around, that may be easier.

11 A. I'm not sure.

12 Q. Stand up and take a good look --

13 A. Well --

14 Q -- so you can see. If you have any trouble seeing, let us
15 know.

16 A. I have no trouble seeing. I'm not sure.

17 Q. So today you are unable to say for sure if you can pick
18 that individual out, is that a fair statement?

19 A. Right now, yes.

20 Q. Right now, right?

21 A. Right.

22 MR. BAKER: Thank you.

23
24 CROSS EXAMINATION BY MR. DEMPSEY:
25

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1 Q. Hi, Mr. Murdoch.

2 A. How are you?

3 Q. When you went out of the bank you went over to Sunshine's
4 parking lot and got in your car?

5 A. Yes.

6 Q. Did you then back your car out of your space?

7 A. Out of the space I was in originally.

8 Q. Then did you pull and face the door across Parkside Avenue
9 of the bank?

10 A. Yes.

11 Q. How far away were you at that time?

12 A. Across the street. How wide it is, I don't know.

13 Q. And then did you stay right there until the fellow came
14 running out of the bank?

15 A. Yes, I did.

16 Q. Okay. And just the one fellow come out?

17 A. That is all I saw.

18 Q. And you then started out with your car, right, out of the
19 lot?

20 A. Yes.

21 Q. And did you come out on Parkside or Hertel?

22 A. On Hertel.

23 Q. And took a left on Hertel?

24 A. Well, you see, Parkside would be here and Hertel is here,
25 and I just -- I was at the signal almost -- I just shot

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1 across Hertel.

2 Q. You are saying --

3 A. I was almost running parallel with Parkside when I pulled
4 my car out.

5 Q. Are you saying the exit of Sunshine's is right there almost
6 right next to the intersection?

7 A. Yes, it is.

8 Q. You came out of there and you didn't stop at the light,
9 you came on through?

10 A. No, I didn't stop.

11 Q. And how far were you behind that fellow all the way that
12 he was running down Parkside Avenue?

13 A. I had him in my vision when he was running.

14 Q. How far were you away from him?

15 A. The other side of the street, he was on the other side,
16 whatever the width is.

17 Q. You were alongside of him as he was running down?

18 A. No, I was on the opposite side.

19 Q. I mean your car was --

20 A. He was ahead of me. My car was here, here is the street,
21 he was over here, my car would be here.

22 Q. Thirty, forty feet away from him all the time?

23 A. I would assume that.

24 Q. And did you have the back of his head in view all the
25 time?

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- 1 A. I had him in view.
- 2 Q. How much of the time did you see his face?
- 3 A. No other time except in the bank.
- 4 Q. So any of the time that he ran down the street you didn't
- 5 see his face at all?
- 6 A. No.
- 7 Q. You don't know if the same individual who was in the bank
- 8 that you saw was the same individual that came running out
- 9 and down Parkside Avenue?
- 10 A. Other than the coat and hat, no.
- 11 Q. Is that correct?
- 12 A. Other than the coat and hat, that is all I recognized.
- 13 Q. You are not sure it is the same fellow?
- 14 A. I didn't see him face to face.
- 15 Q. So that there was one fellow inside the bank who you saw,
- 16 who looked suspicious, about two or three minutes went by --
- 17 A. Not that long.
- 18 Q. A minute went by?
- 19 A. Not that long.
- 20 Q. Thirty seconds went by?
- 21 A. That's it.
- 22 Q. Somebody came running out of the bank?
- 23 A. Yes.
- 24 Q. Yet you never saw his face?
- 25 A. After he had left the bank I saw this person running.

1 Q. You couldn't identify --

2 A. I couldn't identify his face at that time.

3 Q. You never saw his face again?

4 A. I did not.

5 Q. Now, there was a fellow in here this morning that said he
6 saw two people running. Did you ever see two people
7 running?

8 A. Never.

9 Q. You were within thirty, forty feet of this fellow all the
10 time, right?

11 A. I had a pretty good view.

12 Q. Did you get the license number of that car?

13 A. I did.

14 Q. What was the license number that you gave?

15 A. I don't know, I can't remember that.

16 Q. What color of car was it?

17 A. I thought it was a beige convertible.

18 Q. Does beige mean cream color?

19 A. Cream color, light brown.

20 Q. Light brown?

21 A. Yes, light brown or cream.

22 Q. And did that car have anybody else in it?

23 A. Like I said, I couldn't tell you how many was in it.

24 Q. Would it have been --

25 A. Must have had a driver.

- 1 Q. So it would have been one fellow at the wheel, maybe, you
2 are not sure?
- 3 A. I'm not sure how many were in that car.
- 4 Q. Could have been two, could have been three?
- 5 A. Could have been full of people, I only --
- 6 Q. No idea one way or the other?
- 7 A. I saw one young fellow get into it.
- 8 Q. How far were you from the car at the closest point?
- 9 A. I would say about from here to the first row of chairs.
- 10 Q. About twenty five feet?
- 11 A. More than that. I pulled over to the other side to get
12 closer.
- 13 Q. This was a light brown or cream colored car that you saw?
- 14 A. Yes.
- 15 Q. Did you ever see another fellow who worked for the Allstate
16 Insurance Company right there by you in another car? Did
17 you ever see another car there?
- 18 A. No.
- 19 Q. You didn't see a yellow car there?
- 20 A. No.
- 21 Q. What were the weather conditions that day?
- 22 A. The street was wet.
- 23 Q. Dark out?
- 24 A. I don't think it was dark. It was at noon or thereabouts.
- 25 Q. The sun wasn't shining?

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1 A. I don't remember.

2 Q. Okay. One way or the other, you don't know?

3 A. I don't know.

4
5 CROSS EXAMINATION BY MR. GRASHOW:

6 Q. Mr. Murdock --

7 MR. BAKER: Your Honor, to save time, I would ask Mr. Fronk
8 to produce that written, signed statement of
9 the witness.

10 MR. FRONK: Your Honor, he certainly didn't review it
11 prior to testifying.

12 THE COURT: All you have to say is yes or no.

13 MR. FRONK: Well, before I say yes or no, we don't have
14 it, it is a Buffalo Police Department statement.

15 THE COURT: You are saying no?

16 MR. FRONK: I don't have the statement. If I had, I wouldn't
17 produce it.

18 THE COURT: All right, thank you.

19 MR. BAKER: I am asking for that production.

20 THE COURT: You said you were going to ask him for it, you
21 asked.

22 MR. BAKER: I am asking for a ruling.

23 THE COURT: He's not obligated to produce it at this time.

24 MR. BAKER: Thank you.

25 THE COURT: If he wants to, he may, if he had it.

1 BY MR. GRASHOW:

2 Q. Mr. Murdoch, when you were in the bank and you were ready
3 to leave, the gentleman that you saw with his hand in his
4 coat, he was in this express tellers line?

5 A. He was at the first tellers window.

6 Q. At the tellers window?

7 A. Not right up against it, he was -- there was space for me
8 to get by barely.

9 Q. You walked between him and the tellers window?

10 A. Between him and the cage.

11 Q. And would he have been in a position where he was waiting
12 for the next available teller, is that the idea in that
13 bank, you get in line and wait for the next teller window
14 that is open and you go?

15 A. You get in line, there is ropes up, and when a teller has
16 an empty spot she calls you.

17 Q. He was within the roped off area waiting for his turn?

18 A. No.

19 Q. Where was he exactly?

20 A. He was directly in front of the tellers window.

21 Q. Was he transacting business there?

22 A. No, he was not.

23 Q. You had to walk between him and the tellers window?

24 A. Yes.

25 Q. Now, you said then you thought something was wrong, and you

1 pulled your car out of Sunshine's lot, you were waiting
2 for something to happen, your car was pointed toward the front
3 door of the bank?

4 A. Yes.

5 Q. While you were watching that front door, were you watching
6 the immediate area next to -- on Hertel Avenue, the street
7 on Hertel?

8 A. No.

9 Q. When you saw the person come out of the bank --

10 A. Yes.

11 Q. -- what did you see him do?

12 A. Running very fast.

13 Q. Did you follow that person across Hertel Avenue with your
14 eyes?

15 A. When I seen him cross Hertel I was still in the lot, I saw
16 his hat fly off, I followed him both with my car and eyes.

17 Q. While you were watching him cross Hertel, I take it you
18 didn't see any other automobiles in the area?

19 A. No, I couldn't tell you of any other cars.

20 Q. You didn't see any?

21 A. I wasn't aware of any other automobiles.

22 Q. Had there been one, do you think you would have been con-
23 scious of it while you were darting across Hertel?

24 MR. FRONK: I object to that.

25 THE WITNESS: How do you mean that?

1 THE COURT: Overruled.

2 BY MR. GRASHOW:

3 Q. You said you were in the lot?

4 A. I did look to see if I was going to have a collision with
5 anybody.

6 Q. You didn't see anybody, I take it.

7 A. I didn't see anybody.

8 Q. Okay. Now, you then went down Parkside to Huntington and
9 stopped just past Huntington?

10 A. When I saw him turn the corner on Huntington I slowed up,
11 and when I got up to Huntington he was getting in the car,
12 and there was no traffic coming north, I got over closer
13 to Huntington so I could get a look at the plates, that is
14 the reason I moved over.

15 Q. I take it you didn't see anybody behind you?

16 A. Anybody behind me?

17 Q. Right.

18 A. No.

19 Q. Then this car that the person ran toward was near the corner
20 of Huntington and Parkside?

21 A. Yes.

22 Q. What door did you see this person get in of the car?

23 A. The passenger side.

24 Q. The passenger side?

25 A. Yes.

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1 Q. Front of back?

2 A. I don't know how many doors there was in the car.

3 Q. Then you went back to the bank?

4 A. Yes, I went back to the bank.

5 Q. Then do you recall giving the license plate number to the
6 police officer?

7 A. Yes.

8 Q. Do you recall anybody else giving a license plate number to
9 a police officer or the same police officer?

10 A. Yes.

11 Q. Do you recall being corrected on a license plate number that
12 you gave?

13 A. Yes, I had one letter that didn't agree with the other
14 person.

15 Q. That was the first time you saw that person who corrected
16 you?

17 A. Yes.

18 Q. Now, when you made your identification was there an FBI
19 agent or another police officer standing by you when you
20 made the identification?

21 A. I know there was a detective, I can't remember his name.
22 I don't recall if there was an FBI agent standing alongside
23 of me or not.

24 Q. Do you see him here in the court house today, the man that
25 was next to you in the bank?

1 A. Do I see the --

2 Q. Did you see him in the corridor or in here?

3 A. No, he wasn't out in the corridor.

4 Q. How did you signal your identification, did you point and
5 say that is the man?

6 A. I don't know if I pointed or not. I just said, "There is
7 the chap there, the second one on the left."

8 Q. There were other people around making identifications also?

9 A. If there were, I wasn't aware of them.

10 MR. GRASHOW: Thank you very much.

11

12 CROSS EXAMINATION BY MR. DOBSON:

13 Q. Could you tell us if the car had its engine running when
14 the individual jumped in?

15 A. I couldn't tell you whether the engine was running or not.

16 Q. Can you estimate the rate of speed at which the car left
17 that street?

18 A. No.

19 Q. Did you see it go?

20 A. I saw it pull out and go down the street, I couldn't estimate
21 that rate of speed.

22 Q. An exceptionally fast rate of speed?

23 A. I couldn't tell you that.

24 MR. DOBSON: That is all.

25

1 REDIRECT EXAMINATION BY MR. FRONK:

2 Q. Just a couple of questions. Mr. Baker asked you at the
3 end of his questions, Mr. Murdoch, to see if you could see
4 the man you previously identified in court today. I will
5 ask you the same question, just ask you to look around
6 the courtroom and see if you see anyone who you previously
7 identified?

8 MR. DEMPSEY: Now, I object to this. He has already stood
9 up and looked. In fact, Mr. Fronk is telling
10 him to look again, he made a mistake. That is
11 what I want to be reflected on the record.

12 MR. FRONK: Let the record reflect that he didn't look,
13 that is what I am asking him to do.

14 THE COURT: I don't know, I wasn't looking at Mr. Murdoch
15 when the earlier situation come up. Did you
16 stand up at that time and look around, Mr.
17 Murdoch, at individuals in the courtroom?

18 THE WITNESS: I am now.

19 THE COURT: Did you before?

20 THE WITNESS: Yes, I looked before.

21 THE COURT: All right. I will overrule the objection.

22 BY MR. FRONK:

23 Q. I am merely asking you again to look around and see if you
24 are sure that you aren't sure or whatever your opinion is?

25 A. At this time I'm not sure.

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1 MR. FRONK: All right. No further questions.

2 THE COURT: All right. Thank you, Mr. Murdoch.

3

4 (Witness excused.)

5

6 MR. FRONK: The Government calls Elizabeth Malary.

7

8 E L I Z A B E T H M A L A R Y, 1580 Hertel Avenue, Buffalo,
9 New York, called as a witness on behalf of the Government, and
10 being first duly sworn, testified as follows:

11

12 DIRECT EXAMINATION BY MR. FRONK:

13 Q. Is it Miss or Mrs. Malary?

14 A. Mrs.

15 Q. By whom are you employed?

16 A. M & T Bank.

17 Q. How long have you been with M & T?

18 A. Six years.

19 Q. Now, were you employed with the M & T on November 26, 1976?

20 A. Yes.

21 Q. At what branch were you working at at that time?

22 A. The Hertel Office.

23 Q. That is at the corner of Hertel and Parkside?

24 A. Right.

25 Q. Now, what is your position with the bank at Hertel and

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1 Parkside?

2 A. At that time I was head teller.

3 Q. And were you doing normal tellers duties as the head teller?

4 A. Yes.

5 Q. Now, did there come a time on that day, on the 26th of
6 November, when you were handed a note at the window?

7 A. Yes.

8 Q. Can you tell us what took place at that time and prior to
9 that time, as best you recall?

10 A. A young man came in the bank, and he came -- I was waiting
11 on a woman customer -- and he came and he stood very close
12 to her, behind her, and I asked him to please move down
13 in line, because he should have come in the door and stood
14 in line.

15 Q. At that time did you have what is known as an express line
16 system?

17 A. Yes.

18 Q. That is where there is one line, and as the teller opens,
19 the person goes to the free teller?

20 A. That is correct.

21 Q. Did that individual get in that express line?

22 A. No.

23 Q. What did he do?

24 A. He came directly in the door and directly to my tellers
25 station where I was already waiting on a woman customer, and

1 he stood very close behind her.

2 Q. That is when you spoke to him and told him to go to the
3 end of the line?

4 A. I asked him to please go stand in line.

5 Q. What did he do?

6 A. He moved down to the next tellers station, Miss Johnson,
7 who is right next to me.

8 Q. Then what happened?

9 A. She was waiting on a woman customer, I believe, and he
10 stood directly behind her. He began to look angry at me,
11 I guess my voice was snappish at the time, and he began to
12 look angry at me, and I decided not to push the issue any
13 further.

14 Q. Can you describe what the man's wearing apparel was at
15 this time, if you remember?

16 A. He had a black coat, knee length, that looked like leather
17 to me, and he had a hat, it was pulled down, and his collar
18 was up.

19 Q. Was it pulled so low you couldn't see his eyes?

20 A. I could see his eyes but his hair was covered. It was
21 pulled down, I would say, half way over the forehead.

22 Q. Now, did there come a time when the woman you were waiting
23 on left your window?

24 A. Yes.

25 Q. Then what did you do?

1 A. He immediately -- the young man immediately came to my window.

2 Q. Can you tell us what, if anything, happened?

3 A. He presented a bag, and in the bag -- I didn't know if he
4 had a coin order, some customers come in requesting coins
5 for stores, and I thought he might have a coin order -- when
6 I opened the note or paper it said, "This is a robbery, give
7 me your money or you will die." I believe that was the
8 wording. I saw the word "die," and it frightened me.

9 Q. Do you remember looking at him as he was standing in front
10 of you?

11 A. Yes.

12 Q. What did you do after you got the note?

13 A. I hesitated a moment. I was starting to go into panic, and
14 I couldn't think what to do, and I just pretended to faint.

15 Q. Okay. Did you, in fact, fall down on the floor?

16 A. I fell backwards some.

17 Q. Were you able to observe what he did when that happened?

18 A. He just turned around and walked out of the bank.

19 Q. Did you fall to the floor?

20 A. No, I held on to both -- we have very old fashioned cupboards
21 in our bank, they are wooden, they are similar to this area,
22 I held on to both sides, pretending to feel weak.

23 Q. You are indicating now, as you are sitting there, you are
24 putting your hands to the side of the witness box?

25 A. Yes.

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1 Q. Did you -- strike that. Were you able to observe the
2 individual leave the bank?

3 A. Yes.

4 Q. Could you observe him as he went through the doors and
5 out?

6 A. Yes.

7 Q. How far were you able to observe him go when he left the
8 bank?

9 A. I was rushing to an officer at that time. The minute I
10 saw him go out of the door -- my concern was that he had a
11 weapon and that he not grab an officer, the assistant
12 manager's desk is right near the door, my concern at that
13 time was that he would clear the door because I didn't --
14 I was concerned for her life.

15 Q. My question is did you observe him after he left the bank?

16 A. No.

17 Q. Did there come a time after this man left when police and
18 FBI agents arrived at the bank?

19 A. Yes.

20 Q. Did there come a time when four individuals were brought
21 back to the bank?

22 A. Yes.

23 Q. About how long was it from the time when you had pretended
24 to faint, and the man ran out of the bank, when they brought
25 the four individuals back?

- 1 A. Within a half hour, it seemed awfully fast.
- 2 Q. Now, where were you when you first noticed they were bringing
- 3 some individuals back to the bank?
- 4 A. I was in the teller area.
- 5 Q. Was anyone with you or were you alone?
- 6 A. I was talking to an FBI agent.
- 7 Q. Now, do you recall what, if anything, the agent said to
- 8 you when these individuals were brought back?
- 9 A. That if I saw anything that I could indicate -- that I
- 10 could identify anybody, that I should tell him right away.
- 11 Q. Now, I will ask you to describe, as best you recall, the
- 12 actual mechanics of what took place as the four were brought
- 13 back, what you remember happening.
- 14 A. They brought in four men, and to me they were secured, they
- 15 were in custody, I would say that. They didn't just walk
- 16 in the bank, they were with policemen.
- 17 Q. Did any agent tell you they were under arrest?
- 18 A. No.
- 19 Q. What did they do after you observed them come in?
- 20 A. They stood in a line, four in a line, and they faced us
- 21 and then they requested that all four turn, turn around, so
- 22 that we could identify them. They also put a hat on --
- 23 because of the hat -- they put a hat on all four, each one
- 24 individually.
- 25 Q. Now, as you recall observing the scene, was any one of the

1 four singled out for any different treatment from the others?

2 A. No.

3 Q. About how far away were you from them when you were looking
4 at them when they were in this line.

5 A. About from here to where you are standing, possibly a little
6 farther.

7 Q. Ten, twelve feet?

8 A. Right.

9 Q. Were you able to pick out anyone from those four as being
10 the man who stood in front of you with the note?

11 A. Yes.

12 Q. Did you tell the officer or the agent that you could?

13 A. I did.

14 Q. The person you picked out in the line, was he attired in
15 the same manner you had seen him when he had been in front
16 of you?

17 A. He had the long black leather coat, but it was different,
18 when he came to my window he had his hand indicating that
19 he had, to me, a weapon.

20 Q. Right now you are placing your hand sort of under your
21 armpit area?

22 A. No, it was in -- his collar was up and his coat was done
23 up, the hat was down. When they brought him in he didn't
24 have a hat on, except they put it on him, and his coat was
25 undone, loose.

1 Q. The coat was open?

2 A. Yes, that was the only difference.

3 Q. That was the man who stood in front of you?

4 A. It wasn't an individual man, he was in a line.

5 Q. But that is the same man who previously had stood in front
6 of you with a note?

7 A. Yes.

8 MR. FRONK: Okay. I have no further questions.

9
10 CROSS EXAMINATION BY MR. BAKER:

11 Q. Mrs. Malary, about what time did this occur?

12 A. Between ten and ten thirty in the morning.

13 Q. And how many patrons were in the bank at that time?

14 A. I know we were busy because I was trying to move the line.
15 As head teller, I have other duties, I had other duties,
16 but I was trying to move the line, so I would say there
17 were quite a few people. When it is slow, as the head
18 teller, I would have other duties to do, such as making up
19 coin orders or taking care of other duties.

20 Q. You say you had other duties, are you still with the M & T?

21 A. I dropped back from being head teller to regular teller
22 because I became very nervous as a result of this.

23 Q. I understand. You are still with the bank though?

24 A. Yes.

25 Q. Are you still at Hertel Avenue?

- 1 A. Presently I'm on disability. I have a reactivation of
2 rheumatoid arthritis.
- 3 Q. Now, you had one person you were waiting on at that time?
- 4 A. A woman.
- 5 Q. Did you see this person enter the bank?
- 6 A. The woman?
- 7 Q. No, I'm sorry. Did you see the person you identified as
8 the person that passed you the note, did you see that person
9 enter the bank?
- 10 A. Yes, because it makes me very nervous when they cut across
11 the line like that.
- 12 Q. Did you see him come in the door?
- 13 A. Yes.
- 14 Q. How close were you to the door, your tellers window?
- 15 A. Well, that is about ten, twelve feet again.
- 16 Q. And that person took up a spot right behind the lady you
17 were waiting on?
- 18 A. Yes.
- 19 Q. Before you finished with that lady, did you tell that person
20 to move back into the express line?
- 21 A. I asked the young man who came directly in the door and
22 stood behind my woman customer to please move down to the
23 express line.
- 24 Q. You did this before you completed the transaction?
- 25 A. Yes. The woman was becoming upset.

- 1 Q. Because this person was behind her?
- 2 A. So closely directly behind her. He was not -- he wasn't
- 3 loosely behind her, right up close.
- 4 Q. Very tight?
- 5 A. Yes, she was becoming uncomfortable. As the teller, it is
- 6 my duty to give service to the customers.
- 7 Q. When you told this person to move, did he move?
- 8 A. Yes.
- 9 Q. That is when he went to Miss Johnson?
- 10 A. Right.
- 11 Q. And at that point did you finish your transaction?
- 12 A. Yes.
- 13 Q. Concentrated on your transaction?
- 14 A. That is right.
- 15 Q. At that point you were not looking at Miss Johnson's window?
- 16 A. Right.
- 17 Q. Your lady customer left, and was it at this point that you
- 18 told him to come down to you?
- 19 A. Yes.
- 20 Q. Did he have his hand in his pocket?
- 21 A. Yes, he had his hand -- his collar was up, he had his hand
- 22 in as if he had --
- 23 Q. The hand was in the coat?
- 24 A. Yes.
- 25 Q. You were looking directly at him at that point?

- 1 A. Yes, I looked at his face.
- 2 Q. Did you notice the color of his eyes?
- 3 A. They were brown, I believe.
- 4 Q. Did you notice whether he had a beard or not?
- 5 A. He didn't have a beard.
- 6 Q. What about glasses?
- 7 A. He didn't have glasses. He was very -- he had a young
- 8 appearing face to me.
- 9 Q. Did you --
- 10 A. He also had what I would call freckles, some kind of marks
- 11 on his face.
- 12 Q. He appeared to have freckles on his face?
- 13 A. Yes, some kind of marks, I don't know if they were freckles
- 14 or what.
- 15 Q. Did you take note of the height of the individual at all?
- 16 A. Yes, he seemed taller than I am.
- 17 Q. You are how tall?
- 18 A. Five foot two. I have to stand on a platform, and so my
- 19 accuracy in determining height wouldn't be good. I have
- 20 to stand on a platform, because I'm so short, to operate
- 21 the machine.
- 22 Q. At that time you got a note, didn't you?
- 23 A. Yes.
- 24 Q. Was it at that point that you decided to attempt to faint?
- 25 A. Yes.

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1 Q. Fake a faint?

2 A. Yes, because I thought possibly he had a coin order or some
3 kind of a payroll request.

4 Q. When you got the note, it was at that point that you pre-
5 tended to faint?

6 A. Yes.

7 Q. Was it at this time that he turned and walked out the door?

8 A. Yes.

9 Q. From that point on you saw him from the rear?

10 A. That is correct.

11 Q. Did you see him open the door of the bank and leave?

12 A. Yes.

13 Q. As he left the bank was he running or walking?

14 A. I didn't see him after he left the bank. My concern was
15 that he cleared that door.

16 Q. When he cleared the door you paid no attention to him?

17 A. That is right.

18 Q. Up until the point he cleared the door, from the time he left
19 your window, you saw the back of him?

20 A. Right.

21 Q. Did he have his hat on at the time he was leaving the bank?

22 A. I believe so.

23 Q. There came a time when some individuals were returned to
24 the bank?

25 A. Yes.

1 Q. And as you said, in custody?

2 A. Yes, by the police, they were not just walking in casually.

3 Q. Were they handcuffed?

4 A. I can't recall. It seems to me -- I can't recall actually
5 seeing metal handcuffs, I don't recall that. I do know
6 that they were not just walking in the bank casually. There
7 were a lot of people coming in the bank at that time, but
8 they were not -- they were in custody I would say.

9 Q. At that time there were a lot of police?

10 A. Yes.

11 Q. You knew in your mind at that time when these people were
12 brought in that they were in custody?

13 A. Yes.

14 Q. Did you also know at that time in your mind that as far as
15 you were concerned they were suspects?

16 A. Yes.

17 Q. How long after the incident at your tellers cage did this
18 occur?

19 A. It was a very short period of time, I would say within a
20 half hour. I was surprised.

21 Q. Were these individuals placed in any special place in the
22 bank?

23 A. They were just brought in the door, the four of them just
24 were brought in the door and cleared the door.

25 Q. And made to line up?

1 A. Yes, four in a row.

2 Q. And face you?

3 A. Yes.

4 Q. And other people?

5 A. Yes.

6 Q. You were behind the -- in the secured area, the tellers
7 area. Did you see other people making any identification
8 at all?

9 A. At that time I wasn't paying attention. I was trying to
10 concentrate very carefully.

11 THE COURT: You didn't see anything?

12 THE WITNESS: I beg your pardon?

13 THE COURT: You didn't see anybody else making an identifi-
14 cation?

15 THE WITNESS: No.

16 BY MR. BAKER:

17 Q. Were you talking to an FBI agent at that time?

18 A. Yes, one stood at my side.

19 Q. And at this point did he tell you anything as to --

20 A. He instructed --

21 THE COURT: Wait for the question.

22 BY MR. BAKER:

23 Q. -- about these individuals? Did he tell you anything about
24 these individuals?

25 A. No.

1 Q. He instructed you to pick somebody out if you could?

2 A. If I saw anything that would identify any of them.

3 Q. How many of them had coats on at this point?

4 A. They all had jackets or coats.

5 Q. When you say "they all had jackets or coats," similar to
6 the type you had seen before?

7 A. No, only one had the long leather coat, a knee length
8 leather coat, others had jackets.

9 Q. And the person you saw in the bank earlier had a knee length
10 leather coat?

11 A. That is right.

12 Q. Was it the same color?

13 A. Yes, black.

14 Q. Did this help you in identifying the individual?

15 A. Yes.

16 Q. The person you saw earlier in the bank had a hat on?

17 A. That is right.

18 Q. Did the hat have a brim?

19 A. Yes.

20 Q. Could you tell us the color of the hat?

21 A. I believe it was black, but it was pulled down so that the
22 band was very visible. It was not just set on his head, it
23 was pulled down.

24 Q. It was a brimmed hat?

25 A. Yes.

1 Q. The hat they passed around, was it the same color as the
2 hat you saw earlier?

3 A. I believe the hat that I saw was black.

4 Q. What kind of hat did they pass around?

5 A. A gray hat with a wide black band.

6 Q. Did that hat also have a brim on it?

7 A. Yes.

8 Q. Now, when the individual put this hat on, did this help you
9 in making your identification, seeing him with a hat on?

10 A. Yes.

11 Q. When they set it on, did they have him pull it down?

12 A. That is right.

13 Q. When the person had the coat and the hat on —

14 A. Also I saw the freckles.

15 THE COURT: Wait for the question.

16 BY MR. BAKER:

17 Q. When this person had the hat on and the coat on, this aided
18 you in making this identification?

19 A. Yes.

20 Q. Were there any other people you identified that day?

21 A. No.

22 Q. You only picked out one person?

23 A. That is right.

24 Q. Did anybody, any law enforcement officer tell you who the
25 person was that you picked out?

1 A. Not that I recall. I don't remember.

2 Q. Did there come a time at any time after this when you were
3 asked to look at pictures or photographs and select a photo-
4 graph of the individual that you saw in the bank that day?

5 A. No.

6 Q. And do you see that person in the courtroom today? Look
7 around. If you would like, you can stand up.

8 A. Would the young man with the black shirt stand up, please,
9 so I could see him more clearly?

10 Q. Stand up.

11 A. He looks familiar.

12 Q. Okay. Now, your testimony is he looks familiar?

13 A. Yes.

14 Q. That is the best you can do for us today?

15 A. Yes.

16 Q. You can't say for sure today?

17 A. No, because the other young man had quite thick bushy hair.

18 Q. So the best you can do today, he looks familiar, you can't
19 say with certainty that is the same individual, is that a
20 fair statement of your testimony?

21 A. Yes, I can't be sure.

22 MR. BAKER: Thank you.

23
24 CROSS EXAMINATION BY MR. DEMPSEY:

25 Q. Were you on medication that day?

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- 1 A. No.
- 2 Q. Were you taking any pills for your rheumatoid arthritis
- 3 at all?
- 4 A. It was activated, I started having difficulty on January
- 5 14th.
- 6 Q. You had no problem with arthritis before that time?
- 7 A. No, it was under control.
- 8 Q. Had you been taking thorazine or any type of pain pill?
- 9 A. No.
- 10 Q. And you say that you pretended to feel weak, were you in
- 11 fact in control of your facilities?
- 12 A. I was.
- 13 Q. And then you pretended to feel faint?
- 14 A. That is right.
- 15 Q. Were you in fact in control of your facilities at that time?
- 16 A. Yes, I was.
- 17 Q. What is your procedure, as a teller, when somebody slips
- 18 you a note and asks for money?
- 19 A. We have various security measures that we are supposed to
- 20 adhere to.
- 21 Q. And what were those in this case?
- 22 A. For security reasons I don't believe that I am supposed to
- 23 divulge them.
- 24 Q. All right. Let's start with the bait money, did you give
- 25 the bait money?

1 A. No, I didn't.

2 Q. Did you activate --

3 THE COURT: Did you give any money?

4 THE WITNESS: No.

5 BY MR. DEMPSEY:

6 Q. Did you activate the bank camera?

7 A. Yes.

8 Q. And when did that get activated?

9 A. As he was leaving for the door.

10 Q. And how far away from you was he when you activated the
11 bank camera?

12 A. I believe about six feet.

13 Q. And his back was turned to you?

14 A. Yes.

15 Q. Did you have a silent alarm at that bank?

16 A. Yes.

17 Q. Hooked up to the camera or as a separate device?

18 A. Not that I know of.

19 Q. How did you activate that?

20 A. By pulling a button.

21 Q. Did you pull that button?

22 A. No.

23 Q. At any time?

24 A. We're not supposed to pull the button until they leave, my
25 understanding.

1 Q. Did you use any other security precautions, other than the
2 ones I have mentioned?

3 A. No.

4 Q. Are any others available to you at the M & T Parkside? You
5 can trust us.

6 THE COURT: What is that?

7 MR. DEMPSEY: I want to know if there were any other ways
8 to take pictures. This is the first time I
9 knew of that.

10 BY MR. DEMPSEY:

11 Q. Any other ways of taking pictures?

12 A. There is an emergency button that activates the camera.

13 THE COURT: The only means of taking pictures is by the
14 surveillance cameras, is that right?

15 THE WITNESS: That is right.

16 THE COURT: Which you activated, is that right?

17 THE WITNESS: That is right.

18 BY MR. DEMPSEY:

19 Q. Now, when they brought the gentlemen back to the bank, you
20 said you were surprised, what were you surprised about?

21 A. That they would have somebody so soon.

22 Q. In your mind you thought these were the people they suspected,
23 is that correct?

24 A. I really didn't know who they were. I saw they were in
25 custody. I didn't know if they were just people they had

1 just picked up off the street or just who it was. Nothing --
2 they gave us no indication.

3 MR. DEMPSEY: Okay.

4 MR. GRASHOW: No questions, your Honor.

5
6 CROSS EXAMINATION BY MR. DOBSON:

7 Q. Did the hat fit all four individuals, did you notice?

8 A. I don't recall.

9 Q. You don't recall?

10 A. No.

11 Q. Did it fit the individual that you picked out?

12 A. Yes, it seemed to, they pulled it down.

13 MR. DOBSON: That is all I have.

14 MR. FRONK: I have no further questions.

15 THE COURT: Thank you.

16
17 (Witness excused.)

18
19 MR. FRONK: The rest of the witnesses are on the statements,
20 your Honor.

21 THE COURT: How lengthy is that?

22 MR. FRONK: We have agreed to shorten it during the
23 recess. Counsel agreed to stipulate to the
24 actual statements, if I were to ask the witnesses
25 the essence of what was said to them, they would

1 testify according to the 302's which I have
2 turned over to these gentlemen in discovery,
3 which have been discussed in the preliminary
4 hearing.

5 THE COURT: All we need to get into is the circumstances
6 of it being made?

7 MR. FRONK: That is correct.

8 THE COURT: How long does it take to get into that?

9 MR. FRONK: Since I have advice of rights and waivers on
10 all of them, I am not going to have to go through
11 a complicated oral warning of rights.

12 THE COURT: Is there more than one agent involved?

13 MR. FRONK: Yes, your Honor. I think I am going to have
14 to use four different ones.

15 THE COURT: What we will do today is merely take care of
16 the statement supposedly made by Mr. Cole, and
17 Mr. Handley will remain in federal custody
18 pending disposition, and the two Martins are
19 not in custody.

20 MR. GRASHOW: That is correct, your Honor.

21 THE COURT: We are running out of time.

22 MR. DEMPSEY: Your Honor, may I step out of the courtroom
23 for a minute?

24 THE COURT: Yes. Mr. Baker is the only one that has to
25 remain.

1 CLARK S. MAGNESS, 111 West Huron Street,
2 Buffalo, New York, called as a witness on behalf of the Govern-
3 ment, and being first duly sworn, testified as follows:
4

5 DIRECT EXAMINATION BY MR. FROMK:

6 Q. Mr. Magness, by whom are you employed?

7 A. By the FBI, Buffalo, New York.

8 Q. Were you on duty with the FBI on the 26th of November 1976?

9 A. That is correct.

10 Q. Did you have occasion on that day to take part in a bank
11 robbery investigation?

12 A. Yes, sir.

13 Q. Sir, did there come a time during that day when you went
14 to the M & T, Hertel-Parkside Branch, to conduct an inves-
15 tigation?

16 A. Yes, sir.

17 Q. Further did there come a time on that day when it was your
18 responsibility to take a certain suspect into custody?

19 A. Yes, sir.

20 Q. And who would the suspect have been?

21 A. Gary Cole.

22 Q. Now, do you have knowledge, sir -- strike that. Did you
23 formally place Gary Cole under arrest, sir?

24 A. Yes, sir.

25 Q. Now, where did you do that?

1 A. At Buffalo Police Headquarters, Franklin Street.

2 Q. Now, can you tell us what, if anything, you said to Mr.
3 Cole after placing him under arrest?

4 A. Mr. Cole was advised that he was being placed under arrest,
5 he was given his rights, at this point he indicated that
6 he understood his rights.

7 Q. When you say given them, did you read them to him?

8 A. That is correct.

9 Q. Okay. What did he say to you after you read them?

10 A. He indicated that he understood what his rights were.

11 Q. Then what happened?

12 A. We questioned him regarding his whereabouts during the
13 morning, and he indicated that he was at his house until
14 approximately nine fifteen A.M.

15 Q. Sir, at any time during your questioning, after you advised
16 him of his rights, did you request him to sign anything?

17 A. Yes, sir.

18 Q. What would that have been?

19 A. A Waiver of Rights Form.

20 Q. Now, sir, I show you what has been marked as Government's
21 Exhibit 5 for identification, and I will ask you if you
22 can identify that?

23 A. Yes, sir, this is the form which I presented to Mr. Cole,
24 at which time I advised him of his rights.

25 Q. Did you read from this form?

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- 1 A. Yes.
- 2 Q. Does this form have a part of it which is indicated as
- 3 waiver of rights?
- 4 A. That is correct, sir. Mr. Cole signed that, indicating that
- 5 he was willing to talk to us.
- 6 Q. Is your signature on this also,
- 7 A. Yes, sir.
- 8 Q. Now, sir, as part of your investigation, do you have occasion
- 9 to prepare an interview log when you are dealing with an
- 10 arrested person?
- 11 A. Yes, sir.
- 12 Q. What would that contain?
- 13 A. Basically the log contains the time that the interview
- 14 began, whether or not there were any unusual requests during
- 15 the interview, and the time that the interview terminated.
- 16 Q. I show you Government's Exhibit 6 marked for identification,
- 17 and ask you if you can identify that?
- 18 A. That is the interview log which I prepared on the date in
- 19 question.
- 20 Q. Does this indicate the time in which Mr. Cole was arrested?
- 21 A. That is correct.
- 22 Q. Does it indicate the time he was advised of his rights?
- 23 A. Yes.
- 24 Q. Does it indicate that he stated he understood his rights and
- 25 signed a waiver?

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1 A. Yes, sir.

2 Q. At any time when you were questioning him, subsequent to
3 advising him and getting his waiver, did he indicate he
4 wanted to stop talking?

5 A. No, sir.

6 Q. At any time did he indicate that he did not understand what
7 was going on or wanted to talk to an attorney?

8 A. No, sir.

9 MR. FRONK: I have no further questions. I will move
10 Government's Exhibit 5 and Government's Exhibit
11 6 into evidence for purposes of this hearing,
12 your Honor.

13 MR. BAKER: No objection.

14 THE COURT: All right, received.

15
16 (Thereupon Government's Exhibits 5 and 6,
17 premarked for identification, were received
18 and marked in evidence on the hearing.)
19

20 CROSS EXAMINATION BY MR. BAKER:

21 Q. Agent, the first time you came in contact with Gary Cole
22 was at Buffalo Police Department?

23 A. Yes, sir.

24 Q. And you took him into federal custody at that time?

25 A. Yes, sir.

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1 Q. Where did you go from there?

2 A. He was transported after the termination of the interview
3 to the FBI Office for fingerprinting, and so forth.

4 Q. 111 West Huron, is that correct?

5 A. That is right.

6 Q. You then proceeded to interview him, did you not?

7 A. No, sir, he was interviewed at the Buffalo Police Department,
8 and transferred by another agent whose name I'm not familiar
9 with.

10 Q. Did you interview him at Buffalo Police Department?

11 A. Yes, sir.

12 Q. That is where the statement you claim he gave you occurred,
13 is that correct?

14 A. Yes, sir.

15 Q. Now, referring you to Government's Exhibit 5, it contains
16 various statements with regard to -- it says "Your Rights,"
17 on top, did you read those to him?

18 A. Yes, sir.

19 Q. Did you have him read them to himself?

20 A. Yes, sir.

21 Q. Did you question him as to how far he went in school?

22 A. No, sir.

23 Q. Did you ask him whether he could read or write?

24 A. No, sir.

25 Q. Did you question him as to whether or not he used narcotics?

151

1 A. Yes, sir.

2 Q. Did you question him as to whether he had used narcotics
3 that day?

4 A. Yes, sir.

5 Q. What was his answer to that?

6 A. He stated that he had not.

7 Q. Did you question him as to whether or not he used alcohol?

8 A. No, sir.

9 Q. Now, how long -- strike that. I noticed on Government's
10 Exhibit 6, which is your interview log, at 11:43 A.M. you
11 have "identity of agent given," was there more than one
12 agent during this interview?

13 A. Yes, sir.

14 Q. Who was the other agent?

15 A. James McGuigan.

16 Q. Who took an active part in the interview?

17 A. We both did, sir.

18 Q. You were both questioning him, is that correct?

19 A. Yes, sir.

20 Q. Alternately, were you both in the room at the same time?

21 A. Yes, sir.

22 Q. And this commenced at approximately 11:43 A.M. and terminated,
23 according to your exhibit, at 12:42 P.M.?

24 A. Yes, sir.

25 Q. Now, during this interview did you take any notes?

152

1 A. Yes, sir.

2 Q. And eventually did you reduce those notes to what is
3 commonly termed a 302?

4 A. Yes, sir.

5 Q. Do you have those notes with you?

6 A. Yes, sir.

7 Q. You kept those notes?

8 A. That is correct, sir.

9 Q. Do you have them with you today?

10 A. Yes, sir.

11 Q. Could I see them, please?

12 MR. FRONK: I would object to the production, your Honor,
13 because at a hearing at this level they are
14 not called for.

15 THE COURT: They need not be produced.

16 BY MR. BAKER:

17 Q. Did you advise him what he was charged with?

18 A. Yes, sir.

19 Q. At any time during the interview did he ask that a lawyer
20 be assigned to represent him?

21 A. No, sir.

22 Q. Was the interview ever interrupted --

23 A. No, sir.

24 Q. -- by him?

25 A. By him?

- 1 Q. Yes.
- 2 A. No, sir.
- 3 Q. By you?
- 4 A. No, sir.
- 5 Q. It was one continuous interview?
- 6 A. Yes, sir.
- 7 Q. At that point were you aware as to whether or not any of
- 8 the other individuals that you charged had made statements?
- 9 A. Yes, sir.
- 10 Q. You were aware of that fact, correct?
- 11 A. Late in the interview I was informed by one agent that one
- 12 of the other interviewees had made a statement.
- 13 Q. Did you know the content of that statement?
- 14 A. No, sir.
- 15 Q. Did you advise Mr. Cole that a statement had been made by
- 16 another of the individuals arrested?
- 17 A. No, sir.
- 18 MR. BAKER: I have nothing further, your Honor.
- 19 MR. FRONK: I have no further questions, your Honor.
- 20 THE COURT: Relative to the use of alcohol, let me ask
- 21 whether or not there was any evidence of the
- 22 use of alcohol?
- 23 THE WITNESS: No, sir.
- 24 THE COURT: And how did Mr. Cole appear to you at that
- 25 time, as far as his being aware of what was

1 going on and his response to questions, and so
2 forth?

3 THE WITNESS: He appeared aware of what he was saying, said
4 that he was aware of what he was saying.

5 THE COURT: Did he appear frightened or scared?

6 THE WITNESS: No, sir.

7 THE COURT: Nervous?

8 THE WITNESS: No, sir.

9 THE COURT: All right. Anything further?

10 MR. BAKER: Nothing, your Honor.

11 MR. FRONK: Nothing.

12 THE COURT: All right, thank you.

13

14 (Witness excused.)

15

16 THE COURT: Mr. Magness is the only witness you have relative
17 to Gary Cole's statement. Is there anyone you
18 want to call, Mr. Baker?

19 MR. BAKER: No, your Honor, I would rest, as far as that point.

20 THE COURT: All right. Now, it is just my personal problems
21 and plans that require cutting this off at this
22 time. I am sorry that we have been interrupted
23 as we went along, and haven't accomplished it
24 all. I am going to be on vacation until the
25 28th, when I will be back here. I will be back

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1 for just a single day. We had arranged that
2 on that day we would bring the matter on the
3 calendar for purposes of setting a date for
4 trial, contemplating by that time we would
5 have surmounted any suppression problems. We
6 are not going to be able to do that, so I
7 have already scheduled one suppression hearing
8 for that day, I suppose I will have quite a
9 pile up of other matters on the motion calendar,
10 so I can't very well easily schedule another
11 matter that day. I will try on that day, one
12 or more of you may be present, we will try on
13 that day to set up a date for the completion
14 of the suppression hearing. I don't see any
15 reason for all of you being here.

16 MR. DOBSON:

I have to be here anyway.

17 THE COURT:

Whoever is here can know generally the others
18 schedules so we can find a time that is
19 mutually convenient. All right.

20
21 (Thereupon the court was in recess at 4:55 P.M.)
22
23
24
25

VOLUME II

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

Cr. 77-11

GARY COLE, et al.,

Defendants.

Motion to suppress in the above entitled action held
before the HON. JOHN T. ELFVIN, United States District Judge,
in and for the Western District of New York, at Buffalo, New
York, on March 21, 1977.

APPEARANCES:

RICHARD J. ARCARA,
United States Attorney, by
JAMES A. FRONK,
Ass't. United States Attorney,
Appearing on behalf of the Government.

JOHN M. DEMPSEY, ESQ.,
Appearing on behalf of the defendant
Alphonso Handley.

MURRAY J. GRASHOW, ESQ.,
Appearing on behalf of the defendant
Dennis R. Martin.

ARTHUR F. DOBSON, ESQ.,
Appearing on behalf of the defendant
Zachary R. Martin.

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1 PROCEEDINGS OF MARCH 21, 1977.

2
3 THE COURT: All right. We had taken this to a certain
4 point now on the 14th of February, and we set
5 today for a continuation and completion of
6 this suppression hearing. This is Criminal
7 77-11, United States versus Cole, Handley,
8 Martin and Martin. The defendant Alphonso
9 Handley is here with his attorney Mr. Dempsey,
10 and defendant Zachary Martin is in the courtroom,
11 is that right? Mr. Martin, stand up. He is
12 with his attorney, Arthur Dobson. James Fronk
13 for the Government. Attorney Patrick Baker
14 had called asking whether there was any need
15 for him or his defendant to be present, and I
16 understand that the suppression today does not
17 involve Cole?

18 MR. FRONK: No, we finished Cole up before we left on the
19 14th.

20 THE COURT: What about Dennis Martin?

21 MR. FRONK: Dennis Martin is here.

22 THE COURT: All right. We will wait for Mr. Grashow.

23 MR. FRONK: Your Honor, I should state for the record --

24 THE COURT: Wait for Mr. Grashow. Was Mr. Grashow around?

25 MR. DOBSON: He was out in the hall, he had been there since

160

1 three o'clock, now he is gone.

2
3 (Mr. Grashow now present.)

4
5 MR. GRASHOW: I apologize, your Honor.

6 THE COURT: All right. Now, we are concerned today, as I
7 understand it, with statements made by one or
8 more of the defendants?

9 MR. FRONK: That is correct, your Honor.

10 THE COURT: You were going to make a statement before?

11 MR. FRONK: Initially I wanted to tell you that during
12 discovery I had promised certain scientific
13 testing which was not available then, it came
14 in this morning, and I gave a copy to Mr.
15 Dempsey, and Mr. Grashow and Mr. Dobson and
16 Mr. Baker met in my office this morning, and
17 it is the handwriting test on the note, re-
18 vealing that Cole's, Martin's and Martin's
19 fingerprints were on the demand note handed
20 to the teller. No prints of Handley were
21 found on it.

22 THE COURT: You said handwriting or prints or both?

23 MR. FRONK: Fingerprints were found of those three; Martin,
24 Martin and Cole, and handwriting samples of
25 Cole alone were inconclusive.

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1 THE COURT: All right.

2 MR. FRONK: We call Dick Davidson as our first witness, if

3 your Honor is ready.

4 THE COURT: Yes, go ahead.

5 MR. FRONK: Dick Davidson.

6 THE COURT: Are we concerned with statements made by all

7 defendants, each of the three defendants?

8 MR. FRONK: That is correct.

9 THE COURT: All right.

10

11 R I C H A R D D E N N I S D A V I D S O N, 111 West

12 Huron Street, Buffalo, New York, called as a witness on behalf

13 of the Government, and being first duly sworn, testified as

14 follows:

15

16 MR. FRONK: Your Honor, there has been an allegation made

17 by members of the audience and passed on to

18 the defense attorneys that Mr. Davidson

19 allegedly was in the courtroom for the identi-

20 fication part of this suppression hearing. I

21 have no knowledge as to that activity.

22 THE COURT: Obviously nothing that he is going to testify

23 to is going to have to do with the identifica-

24 tion episode?

25 MR. FRONK: No, your Honor. I don't know if he was in fact

1 of not.

2 THE COURT: You don't know if he was in the courtroom?

3 MP FRONK: No.

4 A. GRASHOW: Could we ask him?

5 THE COURT: It doesn't matter if he was.

6 MR. GRASHOW: I don't know what portion of his testimony is

7 going to be affected. I don't know whether or

8 not any statement was made at the same time

9 the other witnesses were stating about the bank

10 or the other areas where the FBI was involved

11 during the other course of the hearing. I don't

12 know if there is going to be any overlap or

13 not.

14 THE COURT: Just for the record, Mr. Davidson, were you

15 present while Mr. Garwol or Miss Johnson, Mr.

16 Murdoch, Mrs. Malary or Special Agent Magness

17 testified on the 14th of February?

18 THE WITNESS: I was out in the corridor, I was not in the

19 courtroom.

20 THE COURT: You were not in the courtroom?

21 THE WITNESS: No, I was not.

22 MR. FRONK: For the record, the testimony will be limited

23 to the statement which has previously been

24 turned over in discovery, that is all.

25

1 DIRECT EXAMINATION BY MR. FRONK:

2 Q. Mr. Davidson, can you tell us by whom you are employed,
3 please?

4 A. The Federal Bureau of Investigation, sir.

5 Q. How long have you been so employed?

6 A. Five and a half years, sir.

7 Q. Now, directing your attention to the 26th of November 1976,
8 did you have occasion to be investigating a bank robbery
9 on that day, sir?

10 A. Yes, sir.

11 Q. And do you recall what bank was involved?

12 THE COURT: Let the record reflect that you are looking at
13 some notes.

14 THE WITNESS: Yes, sir, the Manufacturers and Traders. This
15 is a copy of the 302 that I made up.

16 THE COURT: Are you saying you can't answer the question
17 without looking at it?

18 THE WITNESS: Yes, sir.

19 THE COURT: All right.

20 BY MR. FRONK:

21 Q. Have you refreshed your recollection with reference to
22 what bank it was?

23 A. Yes, sir.

24 Q. Can you tell us what bank was involved in the robbery on
25 the 26th?

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- 1 A. Yes, sir, the Manufacturers and Traders Trust Company at
2 Hertel and Parkside, sir.
- 3 Q. Now, did there come a time when you were involved in the
4 questioning of any suspects?
- 5 A. Yes, sir.
- 6 Q. Can you tell us how you first came to be involved in that
7 particular endeavor?
- 8 A. Yes, sir, it was over at the Buffalo Police Department
9 Robbery Squad, sir. I came into the Robbery Squad and
10 there were, I believe, three people in there, and I pro-
11 ceeded to talk to one of them.
- 12 Q. Do you recall the name of the individual whom you talked
13 to?
- 14 A. Yes, sir. He first identified himself as Willie Handley,
15 and then he further identified himself as Alphonso Handley.
- 16 Q. Where did this conversation take place?
- 17 A. In the Robbery Squad, sir, Buffalo Police Department.
- 18 Q. And do you recall what, if anything, you said to Mr.
19 Handley at the start of the conversation?
- 20 A. Yes, sir, I advised him of his rights, using the Interroga-
21 tion and Advice of Rights Form. I asked him to read the
22 form, and he said he couldn't read. I then proceeded to
23 read the form to him.
- 24 Q. Did he indicate that he understood what the form said?
- 25 A. Yes, sir, he did.

- 1 Q. Did he indicate that he wished to waive those rights?
- 2 A. Yes, sir.
- 3 Q. What, if anything, did you do?
- 4 A. He signed the form, sir.
- 5 Q. Now, did you witness this?
- 6 A. Yes, sir.
- 7 Q. Now, did you make any notations at that time as to Mr.
- 8 Handley's ability to understand what you were saying or
- 9 ability to read or write?
- 10 A. Yes, I made a notation on the form, sir.
- 11 Q. I show you what has been marked Government's Exhibit 7
- 12 for identification, and I ask you if you can identify that?
- 13 A. Yes, I can.
- 14 Q. Can you tell us what it is?
- 15 A. Yes, sir, it is a Form FD-395, Interrogation and Advice of
- 16 Rights Form, sir.
- 17 Q. Is this the form that you have referred to in your prior
- 18 testimony?
- 19 A. Yes, sir, it is.
- 20 Q. And does it bear a time and date on it?
- 21 A. Yes, it does. The date is 11/26/76 and the time is 11:53 A.M.
- 22 Q. And under the waiver of rights is there a signature there?
- 23 A. Yes, sir, there is.
- 24 Q. Can you tell us whose signature?
- 25 A. Alphonso Handley and Willis Handley. He first signed it

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1 Alphonso -- as Willie, then as Alphonso.

2 Q. Now, is there a notation in writing at the bottom of that
3 exhibit, sir?

4 A. Yes.

5 Q. Can you tell us what it says?

6 A. "Ninth grade education, can't read, form was read and
7 explained to Handley," and my initials.

8 Q. You wrote that?

9 A. Yes, I did.

10 Q. At any time when you were explaining those rights on that
11 form orally to Mr. Handley, did he indicate he did not
12 understand?

13 A. No, sir, he did not.

14 Q. Did he ever indicate that he wanted to talk to a lawyer
15 before he said anything?

16 A. No, sir.

17 Q. Did he indicate at any time that he did not want to speak
18 to you?

19 A. No, sir.

20 Q. Was there any question in your mind at the time you signed
21 that form that he understood what you were talking about?

22 A. No question in my mind, sir.

23 Q. After advising him of these and getting the waiver, did
24 you proceed to take a statement from him?

25 A. Yes, sir.

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1 Q. Would that have been a written, signed statement by him?

2 A. No, sir, it was not.

3 Q. Would it be a compilation of your notes of the conversation
4 which you had with him?

5 A. Yes, sir.

6 Q. Did you subsequently reduce those notes to what is known
7 as an FBI 302?

8 A. Yes.

9 Q. At any time during the taking of the statements, which were
10 subsequently reduced to the 302, did Mr. Handley indicate
11 that he wanted to stop talking?

12 A. No, sir.

13 Q. Did he indicate at any time that he wanted to talk to an
14 attorney?

15 A. No, sir.

16 MR. FRONK: I have no further questions, your Honor.

17 THE COURT: Mr. Dempsey?

18 MR. DEMPSEY: May I see the 302?

19 MR. FRONK: It has already been turned over to you. Your
20 Honor, we had a stipulation at the last hearing
21 that we wouldn't belabor the court by going into
22 what was said, since the statements, as we see
23 it, had already been turned over.

24 MR. DEMPSEY: I have no questions.

25 MR. FRONK: I have nothing.

1 THE COURT: All right. I assume the other attorney have
2 no questions?

3 MR. GRASHOW: That is correct, your Honor.

4 MR. DOBSON: That is correct, your Honor.

5
6 (Witness excused.)

7
8 MR. FRONK: Your Honor, for the purposes of the hearing
9 we would move Exhibit 7 for identification into
10 evidence.

11 THE COURT: Received for the purpose of the hearing.

12
13 (Thereupon Government's Exhibit 7, premarked
14 for identification, was received and marked in
15 evidence on the hearing.)

16
17 MR. FRONK: Jim McGuigan.

18
19 J A M E S E. M C G U I G A N, Room 1400, 111 West
20 Huron Street, Buffalo, New York, called as a witness on behalf
21 of the Government, and being first duly sworn, testified as
22 follows:

23
24 DIRECT EXAMINATION BY MR. FRONK:

25

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1 Q. Mr. McGuigan, can you tell us by whom you are employed,
2 please?

3 A. I'm a special agent with the Federal Bureau of Investigation.

4 Q. How long have you been so employed?

5 A. Approximately five and a half years.

6 Q. Did you have occasion during the course of your duties with
7 the FBI to become involved in an investigation of a bank
8 robbery on the 26th of November 1976?

9 A. Yes, sir, I did.

10 Q. Do you recall what bank it was that was involved on that
11 date?

12 A. Manufacturers and Traders Trust Company bank at Hertel and
13 Parkside.

14 Q. Can you tell us how you came to be involved on that date?

15 A. We received a radio message from the Buffalo Police Depart-
16 ment at approximately ten thirty that the bank was robbed.
17 I proceeded from our office to the bank.

18 Q. Did you have an occasion to conduct an investigation on the
19 scene of the bank itself?

20 A. Yes, I did.

21 Q. Did there come a time on the 26th when you had occasion
22 to interview suspects in the bank robbery?

23 A. Yes, I did.

24 Q. Specifically, did you have occasion to interview one
25 Zachary Martin?

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- 1 A. Yes, that is correct.
- 2 Q. Can you tell us where the interview took place?
- 3 A. At the Robbery Squad of the Buffalo Police Department.
- 4 Q. Do you recall who was present when you first spoke to Mr.
- 5 Martin?
- 6 A. Yes, there was another agent, James Gotter.
- 7 Q. Now, other than you and Special Agent Gotter and Mr. Martin,
- 8 do you recall anyone else being present?
- 9 A. No, sir, I don't.
- 10 Q. Can you tell us what, if anything, you said to Mr. Martin
- 11 at the beginning of this session?
- 12 A. I advised him of my identity and the identity of Agent
- 13 Gotter. I told him we wanted to interview him concerning
- 14 his knowledge of the attempted bank robbery of the M & T
- 15 Bank, Hertel and Parkside, earlier on this day.
- 16 Q. After telling him your identification and what you wanted
- 17 to talk about, did you say anything further?
- 18 A. Yes, we furnished him an Interrogation; Advice of Rights
- 19 Form.
- 20 Q. What did you do with that?
- 21 A. I asked him to read it. After he read it, I asked him if
- 22 he understood it. He stated that he did understand it,
- 23 and he signed it.
- 24 Q. He signed the waiver of rights section?
- 25 A. Yes, sir, I believe he did.

1 Q. At any time prior to his signing did he indicate to you
2 that he did not understand what was on that form?

3 A. No, he did not.

4 Q. Did he indicate to you at any time that he could not read
5 the form or understand it?

6 A. No, he did not.

7 Q. At any time prior to his signing of the waiver did he
8 indicate he wished to speak to an attorney?

9 A. No, he did not.

10 Q. I show you what has been marked as Exhibit 1 for identifica-
11 tion, and ask if you can identify that?

12 A. Yes, that is the Interrogation; Advice of Rights Form which
13 I previously mentioned.

14 Q. Does the form indicate a time when you began to speak to
15 Mr. Martin?

16 A. Yes, it does.

17 Q. What time would that be?

18 A. 1:45 P.M.

19 Q. And is there a signature on that form under the waiver of
20 rights?

21 A. Yes, sir, there is.

22 Q. Whose is that?

23 A. Zachary R. Martin.

24 Q. Did you witness that signature being put on there?

25 A. Yes, sir, I did.

- 1 Q. Does your signature appear on this form?
- 2 A. Yes, sir, it does.
- 3 Q. What time would you have signed that?
- 4 A. Approximately 1:48 P.M.
- 5 Q. Now, after that form was signed, indicating a waiver of
- 6 rights, did you proceed to question Mr. Martin?
- 7 A. Yes, sir, I did.
- 8 Q. Approximately how long did you talk to him?
- 9 A. Approximately twenty minutes.
- 10 Q. During that time did he make certain admissions to you
- 11 concerning the bank robbery?
- 12 A. Yes, sir, he did.
- 13 Q. Did you eventually take those admissions and put them into
- 14 an FBI 302?
- 15 A. Yes, sir, I did.
- 16 Q. Did Mr. Martin ever sign a written, sworn statement on the
- 17 26th?
- 18 A. No, sir, he did not.
- 19 Q. The admissions would be put forth in what is known as a
- 20 302?
- 21 A. Yes, sir.
- 22 Q. At any time when you were talking to him during this approxi-
- 23 mately twenty minutes did he indicate that he wanted to
- 24 stop talking?
- 25 A. No, sir, he did not.

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1 Q. Did he indicate that he was not sure of what his rights
2 were in respect to talking to you?

3 A. No, sir.

4 Q. Did he indicate he wanted to see an attorney?

5 A. No, sir.

6 Q. Further showing you what has been marked Government's
7 Exhibit 2 for identification, I ask you if you can identify
8 this?

9 A. Yes, sir, this is the interview log that I prepared.

10 Q. What does it relate to?

11 A. Concerning the interview of Zachary Martin.

12 Q. Does it indicate a time when Zachary Martin was advised of
13 the identity of the agents?

14 A. Yes, sir, it does.

15 Q. What time was that?

16 A. 1:44 P.M.

17 Q. Does it indicate a time when you furnished the Advice of
18 Rights Form to read?

19 A. Yes, sir, that was 1:45 P.M.

20 Q. Does it indicate a time when he waived those rights set forth
21 in the form?

22 A. Yes, sir -- well -- no, sir, it does not.

23 Q. Is there any specific indication of when the interview
24 began?

25 A. Yes, there is, 1:48 P.M.

1 Q. What time would the interview have concluded, according
2 to this form?

3 A. 2:15 P.M.

4 Q. Is there a signature on this form?

5 A. Yes.

6 Q. Whose is that?

7 A. My signature.

8 MR. FRONK: I have no further questions, your Honor.

9 THE COURT: Mr. Dobson?

10
11 CROSS EXAMINATION BY MR. DOBSON:

12 Q. Agent, how long have you been employed by the FBI as a special
13 agent?

14 A. Approximately five and a half years.

15 Q. During the course of that employment and prior thereto, did
16 you have an opportunity to attend various schools of
17 criminology and crime prevention and so forth?

18 A. I attended our new agents' class, and I have attended
19 in-service since that time.

20 Q. Seminars and refresher courses?

21 A. Yes.

22 Q. Did any of the courses include a block of instruction on
23 narcotics and illegal drugs?

24 A. A very small part.

25 Q. A very small part?

1 A. Yes.

2 Q. Have you had any instructions as to being able to identify
3 a user of narcotics?

4 A. No, sir, not specifically.

5 Q. All right. Have you during the course of your experience
6 as an FBI agent come in contact with known users of drugs?

7 A. Yes, sir, I have.

8 Q. Have you made arrests for narcotics, and so forth?

9 A. No, sir, not narcotics arrests.

10 Q. How have you been able to determine these individuals were
11 users of narcotics?

12 A. Mainly by asking them if they were users of narcotics.

13 Q. Is it your testimony that you would not be able to -- strike
14 that. Would you be able to recognize a user of narcotic
15 drugs visually, by observation?

16 A. Yes, sir, maybe at times.

17 Q. What would those times be, under what conditions would you
18 be able to?

19 A. If they were sick, if they were experiencing withdrawal
20 pains, if they appeared incoherent.

21 Q. What do you mean by "incoherent"?

22 A. Not knowing what they are speaking about, not being able
23 to understand questions.

24 Q. Other than those obvious symptoms you wouldn't be able to
25 pick out a narcotics user from the ordinary man on the street

1 if you were having a conversation with him?

2 A. No, sir, I don't think so.

3 Q. Now, with respect to the 302, this 302 is transcribed on
4 the 29th of November 1976?

5 A. I would have to see the 302.

6
7 (Thereupon statement dated 11/29/76 was
8 marked Defendant's Exhibit 1 for identification.)
9

10 BY MR. DOBSON:

11 Q. Agent McGuigan, referring to Defendant's Exhibit 1 for
12 identification, in the upper right hand corner it purports
13 to be an FBI 302, a copy of one, do you recognize it?

14 A. Yes, sir, I recognize it.

15 Q. What is that?

16 A. This is an FD-302 of another agent.

17 Q. Another agent?

18 A. Yes, sir.

19 Q. That is not your own?

20 A. No, sir.

21 Q. I see, all right. I take it from this 302 that another
22 agent brought Zachary Martin to the Robbery Squad?

23 A. That is correct.
24

25 (Thereupon statement of 11/30/76 was marked

Defendant's Exhibit 2 for identification.)

BY MR. DOBSON:

Q. Referring to Defendant's Exhibit 2, would you be able to describe what this document is to the Court?

A. This is a 302 that I prepared concerning the interview of Zachary Martin.

Q. This document was transcribed on the 30th of November 1976?

A. Yes, sir, that is correct.

Q. What does that mean, "Transcribed"?

A. The date it was typed by a stenographer.

Q. It was dictated on the 29th of November 1976?

A. Yes, sir, that is correct.

Q. The interview was on the 26th day --

A. Yes, sir.

Q. -- of November 1976?

A. Yes, sir.

Q. This interview is -- strike that. The 302 as dictated came from the notes which you took on the 26th of November 1976?

A. Yes, sir, that is correct.

Q. Do you have those notes with you?

A. No, sir, I don't.

Q. What happened to those notes?

A. After I dictated the 302 to the stenographer, she returned the typewritten form, I proofread it and made sure it

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1 corresponded to my notes, and after reviewing the 302, the
2 notes were destroyed.

3 Q. This is according to FBI policy, to destroy all initial
4 interview notes?

5 A. Yes, it was.

6 Q. I notice, Agent McGuigan, the 302 is two pages of the
7 statement which Mr. Martin made -- you claim Mr. Martin
8 made to you -- and there follows a certain physical descrip-
9 tion of the Defendant, is that correct?

10 A. Yes, sir.

11 Q. These are facts that you took from him or from the police
12 blotter during the interview?

13 A. From my personal observation and from questions I asked
14 him.

15 Q. Would you make any other observations as to his speech,
16 whether his eyes were bloodshot or the pupils dilated or
17 anything like that normally in a 302?

18 A. I think it would probably depend on the circumstances, if
19 it affected the interview.

20 Q. I notice here, referring to Defendant's Exhibit 2, under
21 the category marked characteristics, scars, marks and
22 tattoos, you mention here "track marks on both arms"?

23 A. Yes, sir.

24 Q. What do you mean by "track marks"?

25 A. Needle marks.

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1 Q. Does that give you any indication that the defendant was
2 a user of narcotic drugs?

3 A. Yes, sir.

4 Q. Is there anywhere on this 302 where any remarks are made
5 with respect to the defendant's speech, his pupils or
6 anything like that?

7 A. No, sir.

8 MR. DOBSON: That is all I have. Thank you.

9
10 REDIRECT EXAMINATION BY MR. FRONK:

11 Q. Directing your attention back to this interview on the
12 26th, Mr. McGuigan, can you describe the physical appearance
13 of Mr. Martin at the time you talked to him, Zachary Martin?

14 A. As far as what?

15 Q. Did he appear to be sick?

16 A. No, sir, he did not.

17 Q. Did he tell you he was sick?

18 A. No, sir.

19 Q. Did he appear to you to be somewhat undergoing what you
20 would term withdrawal symptoms?

21 A. No, sir.

22 Q. Did he indicate to you that he was going through any type
23 of withdrawal?

24 A. No, sir.

25 Q. Did he indicate to you that he was unable to talk?

- 1 A. No, sir.
- 2 Q. Did he indicate to you that he would be physically sick?
- 3 A. No, sir.
- 4 Q. Did he exhibit to you any of the symptoms which you would
- 5 believe would render him sick?
- 6 A. No, sir, he did not.
- 7 Q. Do you recall the condition of his eyes?
- 8 A. No, sir, I don't.
- 9 Q. Do you recall whether at any time during the twenty minutes
- 10 he became ill?
- 11 A. No, sir, he did not.
- 12 Q. At any time did he ask to get up to go to the bathroom?
- 13 A. No, sir, not that I recall.
- 14 Q. Did he say anything about being in bad shape to you?
- 15 A. No, sir.
- 16 Q. Did he say anything at all concerning possibly incapacity
- 17 due to drug use?
- 18 A. He stated he was a drug user.
- 19 Q. Did you ask him anything after he said that to you?
- 20 A. No, sir, I did not.
- 21 Q. After he said that, did he indicate he would be unable to
- 22 talk?
- 23 A. No, sir.
- 24 Q. Did he exhibit any symptoms or any behavior in your opinion
- 25 which would exhibit a drug behavior at that time?

1 A. No, sir, he did not.

2 Q. At any time when you were taking notes and questioning him
3 did you get any indication that he was unable to continue?

4 A. No, sir, I did not.

5 Q. In your opinion, as you were there and present, did he
6 appear to speak to you in a voluntary manner?

7 A. Yes, sir, he did.

8 Q. Did his speech pattern appear to be slurred in any way?

9 A. No, sir, it did not.

10 MR. FRONK: I have no further questions, your Honor.

11 THE COURT: Mr. Dobson?

12
13 RECROSS EXAMINATION BY MR. DOBSON:

14 Q. Upon noticing the track marks on both arms, did you ask
15 him when he had had his last contact with narcotics?

16 A. No, sir, I did not.

17 MR. DOBSON: That is all.

18 MR. DEMPSEY: I have just a couple of questions that haven't
19 been brought out on this hearing, which we
20 talked about when we were in front of the
21 magistrate.

22
23 CROSS EXAMINATION BY MR. DEMPSEY:

24 Q. Did you have knowledge of the circumstances surrounding
25 the arrests of the defendants?

- 1 A. Yes, sir.
- 2 Q. Will you tell us where they were arrested?
- 3 A. By the FBI?
- 4 Q. Well, where were they picked up?
- 5 A. They were picked up at 138 Glenney Drive.
- 6 Q. How far is that from the scene of the holdup attempt?
- 7 A. I would imagine probably about a five or ten minute drive.
- 8 Q. And did you pick them up?
- 9 A. No, sir, I did not.
- 10 Q. By that I mean did anybody from the FBI pick them up?
- 11 A. No, sir, with the exception of Zachary Martin.
- 12 Q. They were picked up by members of the Buffalo Police
- 13 Department?
- 14 A. Yes, sir, that is correct.
- 15 Q. Were warrants issued for them over the Buffalo Police radio?
- 16 A. Yes.
- 17 Q. Then they were taken from 138 Glenney Drive back to the bank,
- 18 is that correct?
- 19 A. That is correct.
- 20 Q. Do you know how much time went by between the actual bank
- 21 robbery and when they were brought back to the bank?
- 22 A. Approximately thirty to forty five minutes.
- 23 MR. DEMPSEY: Thank you very much.
- 24
- 25 CROSS EXAMINATION BY MR. GRASHOW:

1 Q. Did you witness the interrogation of Dennis Martin?

2 A. Yes, sir, I did.

3 MR. GRASHOW: Your Honor, it was not brought out on direct
4 examination about his involvement with respect
5 to the interrogation of Dennis Martin, and I
6 would like to ask him certain questions with
7 respect to that while he is here as a witness.

8 THE COURT: All right.

9 BY MR. GRASHOW:

10 Q. Now, you said you were a witness, were you the actual
11 interrogator or not?

12 A. I was one of two or three.

13 Q. Who else was there?

14 A. Another agent, James Gotter, and Lieutenant Raymond Fries
15 of the Buffalo Police Department.

16 Q. Do you know about what time the defendant Martin was brought
17 before you or when you had contact with him?

18 A. Approximately noon, I believe.

19 Q. This is where, the Buffalo Police Department?

20 A. Robbery Squad, Buffalo Police Department.

21 Q. Were all three police officers and Martin in together at
22 one time?

23 A. Yes, sir.

24 Q. From the start until the finish of the interrogation?

25 A. Yes, sir.

1 Q. And who was questioning Mr. Martin?

2 A. At first -- I think I better clear that up -- he was being
3 interviewed by Agent Gotter, and after a few minutes I
4 joined the interview along with Lieutenant Fries of the
5 Robbery Squad. We continued in the interview until the
6 conclusion.

7 Q. Did you, yourself, ask any questions?

8 A. Yes, sir.

9 Q. Of the questions that you asked, what response did you
10 elicit? What answers did you get to the questions you
11 asked? What questions were answered?

12 THE COURT: One question at a time.

13 MR. GRASHOW: You look confused, your Honor.

14 MR. FRONK: I certainly don't understand the question.

15 THE COURT: Ask the question again.

16 BY MR. GRASHOW:

17 Q. What did you ask Mr. Martin?

18 A. I asked him what he knew about the attempted bank robbery
19 of the M & T Bank at Hertel and Parkside earlier on this
20 date.

21 Q. And had you found out prior to your first question what
22 Agent Gotter had spoken to Martin about?

23 A. Yes, sir, I did.

24 Q. And then you started questioning him at that point with
25 respect to what he knew about the bank robbery?

1 A. Yes.

2 Q. What did he tell you after the question was asked?

3 A. He said on the evening of November 25, 1976 he was at his
4 apartment along with his brother, Zachary, Gary Cole and
5 Alphonso Handley, and they were all unemployed, needed
6 money, and they discussed doing a robbery, and I believe
7 it was Cole that mentioned robbing the Marine Midland Bank
8 at South Park and Louisiana, and Zachary said that wasn't
9 cool, it was a bad place to hit.

10 Q. Zachary said that?

11 A. I believe it was Zachary.

12 Q. What happened?

13 A. It was a bad place to hit. On the morning of November 26,
14 1976, he and his brother, Zachary, were at the apartment,
15 joined by Gary Cole and Alphonso Handley, and at approxi-
16 mately nine o'clock they left the apartment in Zachary's
17 1969 Buick with Zachary driving. They drove then down to
18 the Central Park Plaza, where they discussed snatching
19 a purse, but decided against it because the plaza was too
20 crowded. They then drove down Hertel Avenue and they were
21 about a block from the M & T Bank at Hertel and Parkside
22 when Cole told Zachary to pull over to the side, and he and
23 Cole and Handley got out of the car and walked down to the
24 bank. They came back to the car and Zachary pulled down
25 the side street about a block from the bank and -- excuse

1 me -- I think it was at this point that Cole and Handley
2 came back to the car. They stood outside the car talking
3 for a few minutes, and they left, and returned several
4 minutes later, running back to the car. They got in the
5 car and Cole told Zachary to take off. As they were leaving
6 Handley mentioned to Cole that he blew it. They continued
7 driving and Zachary noticed that someone was following them
8 in another car, and he asked Cole to get out of the car and
9 Cole refused. They continued on back to 138 Glenny Drive
10 where Zachary went to his apartment, Dennis, Gary Cole and
11 Alphonso Handley went into Dennis's apartment. They stayed
12 until they were located by the officers of the Buffalo
13 Police Department.

14 Q. Okay. Now, do you know what question or questions Agent
15 Gotter asked of the defendant Dennis Martin?

16 A. I believe he asked the same questions, what he knew about
17 the attempted robbery on this date.

18 Q. How long was Special Agent Gotter with Dennis Martin before
19 you entered the room, if you know?

20 A. I would guess about five minutes.

21 Q. Do you know if Officer Fries was there with Agent Gotter
22 when this began?

23 A. I believe he was not.

24 Q. Did he come in before or after you?

25 A. I believe we came in at the same time.

1 Q. You and Lieutenant Fries came in at the same time?

2 A. Yes.

3 Q. Had you inquired of Special Agent Gotter whether or not a
4 waiver of rights and interrogation form had been executed
5 by the defendant Martin?

6 A. Yes, I did.

7 Q. What did he tell you?

8 A. I believe I asked him if he had advised Dennis Martin of
9 his rights, he stated he had.

10 Q. Okay. And looking at the waiver of rights form that I have
11 in front of me, which purports to have the signature of
12 James L. Gotter on it, there is a second line for witnesses, is
13 it normal to have all the agents present sign the waiver form?

14 A. The agents that are present when the advice of rights is
15 given.

16 Q. Is it usual to note any remarks with respect to the defen-
17 dant's ability to read and write on the form?

18 A. No, sir, only if the defendant would have stated that he
19 can't read or write.

20 Q. Is that question generally asked?

21 A. I routinely ask it.

22 Q. Is that part of your training as an agent to ask that
23 question of all defendants before asking them to sign?

24 A. I don't think it's something that they teach you, I think
25 it's something that you pick up.

1 MR. GRASHOW: Thank you.

2

3 RECROSS EXAMINATION BY MR. DEMPSEY:

4 Q. Just one question. Did any of the people back at the bank
5 identify anyone in the lineup?

6 A. Yes, sir, they did.

7 Q. Who were they, who did they identify?

8 A. The ones I am familiar with are Teller Susan Martini, she
9 identified Gary Cole; another teller, Sarah Johnson, she
10 identified Gary Cole and Alphonso Handley, and there was
11 a witness, Frank Garwol, he identified Gary Cole. There
12 was another customer whose name I don't recall at this time
13 identified Gary Cole.

14 Q. Who testified here earlier at the last hearing, big, tall
15 fellow who worked for a General Motors?

16 A. Yes, he is one. There is another one, a woman, whose name
17 I don't recall.

18 Q. Who did the fellow from General Motors identify?

19 A. He identified Gary Cole, and the woman also identified
20 Gary Cole.

21 Q. That is it?

22 A. They are the only ones that I can recall at this time.

23 MR. DEMPSEY: Thank you very much.

24 MR. FRONK: Your Honor, I have a couple of questions,
25 inasmuch as they got into this area.

1 BY MR. FRONK:

2 Q. First of all, sir, are you aware of who from your office
3 would have arrested Mr. Dennis Martin?

4 A. No, sir, not exactly. When we arrested him, we actually
5 picked him up at the Buffalo Police Department Holding Cell
6 after they were processed, and it was a matter of two agents
7 picking him up at the holding cell and transporting him back
8 to our office. I don't recall who they were.

9 Q. Do you recall whom from your office arrested Zachary Martin?

10 A. It was the same situation. It may have been myself or any
11 number of other agents.

12 Q. Was Zachary Martin taken to the show up at the bank?

13 A. No, sir he was not.

14 Q. Was Dennis Martin taken to the show up at the bank?

15 A. Yes, sir, he was.

16 Q. Now, you indicated, sir, I think, you are not present when
17 Agent Gotter originally started talking to Dennis Martin?

18 A. Yes, sir.

19 Q. When you came in the interview had already started?

20 A. Yes, sir.

21 Q. Were you present for the duration of the interview?

22 A. Yes, sir, I was.

23 Q. At any time during the interview did Dennis Martin say
24 that he wanted to stop talking?

25 A. No, sir.

1 Q. At any time did he say he did not understand his rights
2 or what was going on?

3 A. No, sir.

4 Q. At any time did he indicate that he wanted to see an attorney?

5 A. No, sir.

6 Q. At any time did he indicate to you that he was under the
7 influence of any drugs?

8 A. No, sir.

9 Q. Did he indicate to you during the interview any drug use?

10 A. No, sir, not that I recall.

11 Q. Did he indicate or tell you at any time that he was sick?

12 A. No, sir.

13 Q. Did he ask to leave the room for medical reasons or to go
14 to the bathroom?

15 A. No, sir, not that I recall.

16 Q. Anything about his physical appearance which indicated to
17 you that he was under the influence of drugs?

18 A. No, sir.

19 Q. At any time did he make any indication to you that he was
20 physically infirm to the point where he couldn't continue?

21 A. No, sir.

22 Q. Do you recall whether there was any written, signed state-
23 ment taken at that time?

24 A. No, sir, there was not.

25 Q. Were the substance of the oral remarks made up later on

1 what is known as an FBI 302?

2 A. Yes.

3 Q. Do you recall who would have been responsible for the
4 drafting of the notes into the 302?

5 A. Agent Gotter.

6 MR. FRONK: I have no further questions of this witness,
7 your Honor.

8 BY MR. GRASHOW:

9 Q. With respect to Dennis Martin, did you make any notes
10 yourself?

11 A. No, sir.

12 Q. None whatsoever?

13 A. No, sir, not that I recall.

14 Q. As far as you know, any notes were made by Special Agent
15 Gotter and retained by Gotter until he destroyed them?

16 A. Yes, sir.

17 MR. GRASHOW: Thank you.

18 MR. FRONK: I move Exhibits 1 and 2 concerning Zachary
19 Martin into evidence for the purposes of this
20 hearing.

21 THE COURT: All right, received in evidence for his hearing.

22

23 (Thoreupon Government's Exhibits 1 and 2, pre-
24 marked for identification, were received and
25 marked in evidence on the hearing.)

1 MR. FRONK: I call James Gotter.

2
3 J A M E S L. G O T T E R, 111 West Huron Street, Buffalo,
4 New York, called as a witness on behalf of the Government, and
5 being first duly sworn, testified as follows:
6

7 DIRECT EXAMINATION BY MR. FRONK:

8 Q. Mr. Gotter —

9 THE COURT: Dennis Martin isn't in the room, is he?

10 MR. GRASHOW: No, he is not. I'm sorry, your Honor, I didn't
11 realize he had left.
12

13 (Dennis Martin now present.)
14

15 THE COURT: All right, go ahead.

16 BY MR. FRONK:

17 Q. Mr. Gotter, by whom are you employed?

18 A. Federal Bureau of Investigation.

19 Q. How long have you been so employed?

20 A. About six years.

21 Q. Sir, directing your attention to the 26th of November 1976,
22 did you have occasion on that date to participate in the
23 investigation concerning a bank robbery at the M & T Bank?

24 A. Yes, sir, I did.

25 Q. Can you tell us approximately what time you became involved

1 in this investigation?

2 A. I believe it was somewhere in the neighborhood of between
3 quarter to eleven, eleven o'clock.

4 Q. And in the course of your investigation, sir, did there
5 come a time when you had cause to conduct an interview of
6 a suspect by the name of Dennis Martin?

7 A. Yes, sir, I did.

8 Q. Where did that interview take place?

9 A. At the Bank Robbery Squad, Buffalo Police Department.

10 Q. Now, when you first spoke with Mr. Dennis Martin can you
11 tell us who was present?

12 A. James McGuigan was with me, he went into another room at
13 the same time I was advising him of his rights.

14 Q. Can you tell us who was present when you have indicated
15 you were advising Mr. Martin of his rights?

16 A. James McGuigan was standing there as I was advising him
17 of his rights, then he went into another room before I
18 finished.

19 Q. So by the time you were finished advising him of his rights
20 you were the only one in the room, other than Mr. Martin?

21 MR. GRASHOW: I object to the leading.

22 THE COURT: It is leading, but it is a recap, overruled.

23 BY MR. FRONK:

24 Q. Can you tell us, as best you recall, exactly what you said
25 to Mr. Martin?

- 1 A. I advised him that I had to advise him of his rights, and
2 I gave him what we call a FD-395, I kept a copy and read
3 him the exact copy that I had of what he was reading, and
4 I asked him at the end if he understood these rights, he
5 said he did, and I asked him if he would like to sign that,
6 he did not have to, he signed them and then I think James
7 McGuigan came back and we began the questioning.
- 8 Q. At any time prior to the signing did he indicate to you
9 that he did not understand what was on that form?
- 10 A. No, sir.
- 11 Q. Did he indicate that he did not want to talk?
- 12 A. No, sir.
- 13 Q. Prior to his signing that form did he indicate that he
14 wanted to speak to an attorney?
- 15 A. No, sir.
- 16 Q. Did he indicate to you prior to signing that he did not
17 understand any part of it?
- 18 A. No, sir.
- 19 Q. Did he, in fact, sign the waiver of rights in your presence?
- 20 A. Yes, sir, he did.
- 21 Q. I show you what has been marked Exhibit 3 for identification,
22 and ask if you can identify that?
- 23 A. Yes, this is the form I gave him, because I witnessed it,
24 and at the time I witnessed it that is when James McGuigan
25 and the other agent wasn't there.

1 Q. Was there another agent on this paper?

2 A. Yes.

3 Q. Whose signature is that?

4 A. Dennis Martin's.

5 Q. Did you witness that signature?

6 A. Yes.

7 Q. Approximately what time was it when you advised Mr. Martin
8 of his rights on this form?

9 A. Around noon. I would say by this time it was twelve-o-five,
10 and I read him the rights, which only took approximately
11 three or four minutes. The time stated down here says
12 twelve-o-eight.

13 Q. Did you happen to make an interview log of the events that
14 transpired in the interview room?

15 A. Yes, sir, I did.

16 Q. I show you what has been marked Exhibit 4, and ask if you
17 can identify that?

18 A. Yes, that is an interview log I made.

19 Q. Does that indicate at what time you began questioning Mr.
20 Martin?

21 A. Yes, sir, it does.

22 Q. Does it indicate at what time Mr. Martin was advised of his
23 rights by yourself?

24 A. Yes, sir, it does.

25 Q. Now, approximately how long did you interview Mr. Martin?

- 1 A. Twenty to twenty five minutes.
- 2 Q. At any time during that interview did he indicate to you
- 3 that he did not want to talk to you anymore?
- 4 A. No, sir.
- 5 Q. At any time did he indicate that he did not understand what
- 6 was going on?
- 7 A. No, sir.
- 8 Q. At any time did he indicate that he wanted to talk to a
- 9 lawyer?
- 10 A. No.
- 11 Q. At any time did Mr. Martin indicate to you that he was
- 12 sick?
- 13 A. No, sir.
- 14 Q. At any time did he appear to be physically ill to you?
- 15 A. No.
- 16 Q. Did you have any conversation with Mr. Martin at that time
- 17 concerning drug use by him?
- 18 A. No.
- 19 Q. At any time did he tell you he was suffering any withdrawal
- 20 symptoms from the use of drugs?
- 21 A. No.
- 22 Q. Did he exhibit any physical characteristics to you which
- 23 you would believe might indicate he was sick?
- 24 A. No.
- 25 Q. Did anything go on during this time you were questioning

1 him which would indicate to you that he was unable to
2 understand the nature of the proceedings that were going
3 on?

4 A. No.

5 Q. Now, did you take notes of the conversations which were
6 going on in that room?

7 A. Yes, sir, I did.

8 Q. And did you ultimately take those notes and prepare what
9 is known as an FBI 302?

10 A. Yes, sir, I did.

11 Q. Can you tell us how you prepared that?

12 A. Well, I take my notes and I get a stenographer in, dictate
13 it to the stenographer, she takes it back and types it up
14 and brings it back. I compare my notes to the 302 and if
15 there is any discrepancies I have her change them because
16 they are supposed to go along with the notes. If every-
17 thing is okay then I keep the 302, and tear up my notes.

18 Q. Is that the procedure you followed in this case?

19 A. Yes, sir.

20 MR. FRONK: I have no further questions of this witness,
21 your Honor.

22
23 CROSS EXAMINATION BY MR. GRASHOW:

24 Q. Agent Gotter?

25 A. Yes, sir.

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1 Q. I think you testified on direct examination that you and
2 Agent McGuigan were interviewing the defendant Dennis Martin?

3 A. Yes.

4 Q. Was anybody else present at that interview?

5 A. At the beginning no one else was present, then Ray Fries
6 came over because of something that Dennis Martin said.

7 Q. What was it that was said?

8 A. He stated -- he asked me if his brother Zachary was there
9 and I said I hadn't seen him. He stated Zachary was driving
10 the car and that the other gentlemen the police had arrested
11 or brought in the police department was, I think, his girl-
12 friend's brother, and he didn't have anything to do with
13 it, that was his brother that was driving the car. Ray
14 Fries come over and we explained it to him, and he stayed
15 throughout the rest of the interview.

16 Q. I think you stated on direct examination that you and
17 Special Agent McGuigan began this interview together?

18 A. Yes, basically.

19 Q. In other words, the two of you went into the room at the
20 same time and were both with Dennis Martin at the same
21 time?

22 A. Well, there wasn't enough space in the Robbery Squad, we
23 were sitting like in the hallway that goes in the back
24 squad room, and there are two other rooms, and Dennis and
25 I were sitting in the hallway, and James McGuigan was there

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1 when I started giving him the rights, and he went in the
2 back room and came back out when he started to talk about
3 the robbery.

4 Q. How long did Agent McGuigan stay with you until he left?

5 A. Well, when I first started reading him his rights, he was
6 gone approximately three or four minutes, he came back,
7 that is when we started questioning him. He stayed with
8 him, I think, throughout the whole questioning.

9 Q. Did Agent McGuigan hear you read the rights, as far as you
10 know?

11 A. He may have heard me start them, you know.

12 Q. Okay. When he returned had Mr. Martin executed the waiver
13 of rights portion of the form yet?

14 A. Yes, he had.

15 Q. Did you discuss with Agent McGuigan the execution of this
16 waiver of rights form?

17 A. Yes, sir.

18 Q. Did Agent McGuigan ask Dennis Martin anything about signing
19 this form?

20 A. I think he asked him if he understood these rights, and
21 Dennis, I think, nodded he did, that was it.

22 Q. Did you ever ask the other agent to sign or witness the
23 waiver of rights form?

24 A. I mentioned it to him at the time, and he said he would or
25 that he wouldn't because he wasn't there through the whole

1 reading of the rights, I don't remember.

2 Q. When you were reading these rights to Dennis Martin, did you
3 ask him any questions about his educational background?

4 A. Yes, I asked if he could read and write and he said yes,
5 he could. I didn't ask what grade he completed.

6 Q. And were you -- strike that. Did you have any doubts in
7 your mind as to what his educational levels were, whether
8 or not he was able to understand what you were reading to
9 him?

10 A. No, sir.

11 Q. You didn't concern yourself with that or didn't have any
12 doubt about it?

13 A. I didn't have any doubt.

14 Q. I see. You never asked him how far he went in school?

15 A. I don't believe so.

16 Q. Okay. Had you asked him that question would you have made
17 a notation anywhere?

18 A. It is possible. Just sometimes when you ask some of the
19 people you question it is just habit, other times, you know,
20 it might slip out, and you don't ask them how far they went
21 in school.

22 Q. Was there a search made of Dennis Martin in your presence?

23 A. No, sir, I don't think so.

24 Q. Do you recall what he was wearing at the time that you were
25 interviewing him?

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- 1 A. I believe he had a red turtleneck shirt like, it wasn't a
2 sweater I don't think. It might have been a sweater.
- 3 Q. Long sleeve or short sleeve?
- 4 A. I think it was long sleeve.
- 5 Q. Do you know if the sleeves were rolled up?
- 6 A. I believe they would have been down or I would have noticed
7 them if they were.
- 8 Q. Were you also at the interview of Zachary Martin?
- 9 A. Yes, sir.
- 10 Q. And did you note that Zachary Martin had certain needle
11 marks on his arms?
- 12 A. No, sir.
- 13 Q. Are you aware today that he had certain needle marks on
14 his arms?
- 15 A. No, sir.
- 16 Q. You didn't take any note of that?
- 17 A. The first time I became aware of it was when we were finger-
18 printing all the subjects at the FBI, and I think somebody
19 stated the fact Zachary was sick, he had TV, and the other
20 guys were possibly involved in using drugs, they might
21 be coming down.
- 22 Q. This was said when?
- 23 A. When they were at the FBI field office.
- 24 Q. This was before or after your interview at the Buffalo
25 Police Department?

1 A. Oh, after.

2 Q. And do you know how it came to be that any discovery was
3 made of the needle marks on Zachary Martin?

4 A. No, sir, I don't.

5 Q. When you saw Zachary Martin were his sleeves rolled up or
6 not?

7 A. I don't recall. I can't really remember what he had on.

8 Q. As far as you know, you didn't see any track marks on
9 Dennis Martin?

10 A. No, sir, I didn't.

11 Q. By the way, in your training as an FBI agent did you have
12 any special training with respect to identification of
13 narcotics users?

14 A. We have a little bit, not a lot.

15 Q. What was the extent of your training?

16 A. I think they basically tell you that if their eyes are
17 dilated, if they seem to shake and have running noses,
18 it is possible they are drug users.

19 Q. What are you supposed to do if you make those observations?

20 A. It depends on the situation. I think if you like have them
21 in custody you are supposed to find out if they are in pain,
22 find a doctor when you take them into jail.

23 Q. How about with respect to interviews you are conducting?

24 A. The interviews -- if you notice something like that you
25 are supposed to stop the interview.

1 Q. Regardless of whether or not the waiver of rights has
2 been signed or not, is that correct?

3 A. I believe so.

4 Q. Now, did you make any observations of Dennis Martin?

5 A. Yes. Dennis -- when I found out that some of them were on
6 drugs it surprised me because they all seemed to be very
7 coherent, very calm, none of them seemed nervous, there was
8 no perspiration like if a person is nervous they start to
9 perspire, they seemed very calm.

10 Q. Have you ever made any arrests of a narcotics user or
11 possessor?

12 A. Not, you know, that had a problem at the time I arrested
13 him.

14 Q. Okay. You never arrested anybody for the particular crime
15 of narcotics possession?

16 A. Never.

17 Q. Have you ever arrested anybody that you identified to be a
18 narcotics user?

19 A. No, not really, except if Dennis was a narcotics user, that
20 would be the only case.

21 Q. Have you had any opportunity to view a person in custody
22 who was either high from these narcotics or experiencing
23 withdrawals or early symptoms?

24 A. No, sir.

25 Q. You haven't. So then what you said before with respect to

1 the comments about the defendants, they could have been
2 high from narcotics, as far as you are concerned, is that
3 true?

4 A. No, sir.

5 Q. You are absolutely sure they were not?

6 A. Yes, sir.

7 Q. Well, what would be your comparison?

8 A. From what I have seen, such as in our training films, et
9 cetera. They had none of the symptoms at that time of
10 being high.

11 Q. What are some of the symptoms of being high?

12 A. Kind of punchy, that is what you see in the films, kind
13 of punchy, and I don't care attitude, sometimes they get
14 smart, and other things, but there was none of that.

15 Q. I would imagine in your experience as an FBI agent you have
16 experienced people exhibiting those qualities who were not
17 high on narcotics?

18 A. Possibly, yes.

19 Q. So all the things you saw in your training film with respect
20 to how to identify a narcotics user might apply to a non-
21 narcotics user?

22 A. That is possible.

23 Q. Wouldn't it be fair to say that the person who appears
24 calm, who doesn't appear to be high to you, could just as
25 well be using narcotics as a person who doesn't use narcotics?

1 A. It could be.

2 Q. At this point you can't be sure Dennis Martin wasn't high on
3 narcotics, isn't that true?

4 A. That is true.

5 Q. Now, after Mr. Dennis Martin executed the waiver of rights
6 form did you begin to question him?

7 A. Yes, sir.

8 Q. What questions did you ask him?

9 A. I asked him -- I think first I asked him to state his name,
10 where he lived, and then I think I went into basically about
11 the bank robbery, if he knew anything about it.

12 Q. Did he give you the answers to these questions?

13 A. Yes.

14 Q. Okay. And during this time I take it Agent McGuigan was
15 with you, is that correct?

16 A. Yes.

17 Q. Were you conducting this interview?

18 A. Most of the time, yes, sir.

19 Q. Were you asking the basic questions that you have just
20 related here?

21 A. Yes, sir.

22 Q. Okay. Did the other two police officers who were present
23 ask any questions?

24 A. Toward the end, yes, they did.

25 Q. Do you recall what they asked?

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1 A. No, I don't.

2 Q. Do you recall whether or not they went through some of the
3 same questions that you asked?

4 A. They could have.

5 Q. You don't recall at all?

6 A. No.

7 Q. By the way, did you make any notes of your interview?

8 A. Yes, sir, I did.

9 Q. And where are the notes now?

10 A. Well, it was probably three or four days after I took the
11 notes that they were destroyed.

12 Q. Did you personally destroy them?

13 A. Yes.

14 Q. And I take it then you reduced your notes to a 302 form?

15 A. Yes, sir.

16 Q. Did you make any other notations at all of your remarks in
17 the interview, any other record or file of the FBI?

18 A. No, sir.

19 Q. The 302 is the only manner in which you transmitted what
20 was said in the interview?

21 A. Yes.

22 Q. Any tape recordings made?

23 A. No.

24 MR. GRASHOW: I think that is all I have.

25 MR. FRONK: I have nothing further, your Honor. I move

1 Exhibits 3 and 4 in evidence for the purpose
2 of this hearing.

3 MR. DOBSON: May I have a couple of questions regarding the
4 waiver of rights of Zachary Martin?

5 THE COURT: All right.

6
7 CROSS EXAMINATION BY MR. DOBSON:

8 Q. Do you recall witnessing Zachary Martin executing the
9 waiver of rights form?

10 A. Yes, sir.

11 Q. That was done in the presence of yourself and Agent McGuigan?

12 A. Yes, sir.

13 Q. Were you present when Mr. Martin told Agent McGuigan that
14 he was a drug user?

15 A. I believe so.

16 Q. That was in the beginning of the interview?

17 A. Well, I was there I think for almost the whole interview.
18 I don't recall him saying he was a drug user.

19 Q. Did you observe the track marks on Mr. Martin's arms during
20 the course of the interview?

21 A. No, sir.

22 Q. You didn't. Did you see Agent McGuigan roll up his sleeve
23 or do anything to make that observation himself?

24 A. I don't recall, sir.

25 Q. Referring to the statement you made earlier, I believe you

1 said that you were surprised when you found these people
2 were drug users?

3 A. Yes, because -- in other words -- at the time when I saw
4 all the suspects, at that time they all seemed very calm,
5 didn't seem to be high on anything, and then later on when
6 we were over at the FBI Office fingerprinting them, I
7 heard some of them say they were kind of, you know, uneasy
8 because they were coming down. It kind of surprised me
9 because I didn't think they were on drugs. Somebody stated
10 it, I don't know whether it was the subject or whether it
11 was one of the guys in the office.

12 Q. Do you have any experience with -- have you in your
13 experience as an FBI agent seen anybody on what they call
14 downers, depressants?

15 A. Not really, no, sir.

16 Q. Was the fact they were so calm, Agent Gotter, was that
17 unusual, in and of itself?

18 A. No, sir.

19 Q. Did you or any of the agents once you learned of the
20 defendant's drug addiction take a urine or blood sample
21 or ask that the defendant give you any?

22 A. No, sir, not that I know of.

23 MR. DOBSON: Thank you.

24 MR. FRONK: I have nothing further.

25 (Witness excused.)

I hereby certify that this record is a
true and accurate transcript from my
stenographic notes in this proceeding.

Tary J. Keel
Official Reporter
U. S. District Court

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3 -----
4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 -vs-

Cr. 77-11

7 GARY COLE, et al.,

8 Defendants.
9 -----

10 Supplemental transcript on the motion to suppress in
11 the above entitled action held before the HON. JOHN T. ELFVIN,
12 United States District Judge, in and for the Western District
13 of New York, at Buffalo, New York, on March 21, 1977.
14

15 APPEARANCES:

16 RICHARD J. ARCARA,
17 United States Attorney, by
18 JAMES A. FRONK,
19 Ass't. United States Attorney,
20 Appearing on behalf of the Government.

21 JOHN M. DEMPSEY, ESQ.,
22 Appearing on behalf of the defendant
23 Alphonso Handley.

24 MURRAY J. GRASHOW, ESQ.,
25 Appearing on behalf of the defendant
Dennis R. Martin.

ARTHUR F. DOBSON, ESQ.,
Appearing on behalf of the defendant
Zachary R. Martin.

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* * * * *

1 THE COURT: All right. Let's see, do you have any
2 witnesses?

3 MR. DOBSON: Yes, I have three, your Honor, very brief.

4 THE COURT: All right.

5 MR. DOBSON: I call Zachary Martin to the stand.

6
7 Z A C H A R Y R A N D O L P H M A R T I N , 138 Glenny
8 Drive, Buffalo, New York, called as a witness in his own behalf,
9 and being first duly sworn, testified as follows:

10 DIRECT EXAMINATION BY MR. DOBSON:

11 Q. Mr. Martin, how old are you?

12 A. Twenty-three.

13 Q. Are you a drug addict?

14 A. Yes, I am.

15 Q. How long have you been addicted to drugs?

16 A. About three and a half years.

17 Q. Three and a half years?

18 A. Yes.

19 Q. What drugs do you use now?

20 A. Talwin.

21 Q. Do you know whether Talwin is a stimulant or a depressant?

22 A. No, I don't.

23 Q. Were you addicted to drugs on the 26th day of November 1976?

24 A. Yes, I was.

25 Q. All right. Did you have -- did you use drugs on that day?

- 1 A. Yes, I did.
- 2 Q. What time of the day was that?
- 3 A. About quarter to twelve -- I had been using them all day --
- 4 I used them about quarter to twelve.
- 5 Q. Would you describe to the Court what you did with respect
- 6 to this drug use?
- 7 A. What I did?
- 8 Q. Yes.
- 9 A. I shot up.
- 10 Q. What do you mean by "shot up"?
- 11 A. Well, I put about forty-five Talwins in a cooker and I
- 12 shot up about six, seven times, something like that.
- 13 Q. What effect does shooting up Talwin have on you?
- 14 A. Talwin brings you down, it's a downer, it makes you -- it's
- 15 something like heroin, it's a down high.
- 16 Q. What do you mean "a down high"?
- 17 A. It makes you feel good, drowsy, you know. I can't explain
- 18 it, you know, I don't know.
- 19 Q. Did you have that feeling after shooting up on the 26th
- 20 of November 1976?
- 21 A. Yes, I did.
- 22 Q. Do you remember being arrested or picked up by special
- 23 agents of the FBI later on that morning?
- 24 A. No, I doesn't.
- 25 Q. You don't remember that?

- 1 A. No.
- 2 Q. Do you recall being interviewed by special agents that day?
- 3 A. No, I doesn't.
- 4 Q. What is the first recollection that you have of that day
- 5 after you shot up with the Talwin?
- 6 A. When I first came -- when I first knew what I was doing?
- 7 A. Yes. What do you remember, if anything, of that day, what
- 8 was the first thing you remember?
- 9 A. When I was in the courtroom in front of Judge Maxwell.
- 10 Q. That is downstairs in the Magistrate's office?
- 11 A. Yes, sir.
- 12 Q. You don't recall being interviewed by the FBI?
- 13 A. No, I doesn't.
- 14 MR. DOBSON: That is all I have.
- 15
- 16 CROSS EXAMINATION BY MR. FRONK:
- 17 Q. How long have you been a drug user, Zach?
- 18 A. About three and a half years.
- 19 Q. What kind of drugs have you used?
- 20 A. I have used heroin, Talwin, Robatussin, pills, everything.
- 21 I have been using drugs since I was eight. I have a habit
- 22 formed since three and a half years.
- 23 Q. Have you in the last three years -- have you used drugs
- 24 every week in the last three years, let's say?
- 25 A. Every day.

1 Q. Do you recall coming to my office two years ago and talk-
2 ing to me?

3 A. Yes, I do.

4 Q. How did you feel that day, do you recall?

5 MR. DOBSON: Your Honor, I object to this line of
6 questioning. I don't know what relevance that
7 has to this entire matter.

8 THE COURT: Some. I will allow it.

9 BY MR. FRONK:

10 Q. Do you recall how long you were in my office, Zach?

11 A. No, I doesn't.

12 Q. Do you recall talking to me?

13 A. Yes, I did.

14 Q. Do you remember sitting across from my desk and talking
15 to me?

16 A. Yes, I did.

17 Q. Do you recall that I asked you certain questions?

18 A. Yes.

19 Q. Do you remember answering me?

20 A. Yes.

21 Q. Do you remember who was with you?

22 A. No.

23 Q. Do you know a woman named Charlene Green?

24 A. Yes, sir.

25 Q. Do you recall her being in the office?

- 1 A. Yes.
- 2 Q. Do you recall that we talked for almost two hours on that
- 3 day about some activities?
- 4 A. No.
- 5 Q. Did you ever tell me on that day that you were sick?
- 6 A. No.
- 7 Q. Did you ever tell me that you were high when you were
- 8 sitting in front of me?
- 9 A. I don't know.
- 10 Q. Do you recall feeling sick when you were sitting in front
- 11 of me?
- 12 A. I don't know.
- 13 Q. Did you have any problem talking to me?
- 14 A. No, not as I can recall.
- 15 Q. When you spoke to the agents on the day of the bank robbery,
- 16 do you recall being sick that day?
- 17 A. I don't know.
- 18 Q. When you say you feel down, is that a good feeling or a
- 19 rotten feeling?
- 20 A. You just way down. You just -- you know -- you just --
- 21 in other words, you just drugged up.
- 22 Q. Does it feel good or bad to you?
- 23 A. It feel good or I wouldn't take it.
- 24 Q. How long does it feel good, I mean from one time when you
- 25 shoot up?

1 A. According to how long you have been on it, how much of a
2 habit you have.

3 Q. Okay. In November, around the 26th, which is around
4 Thanksgiving, how long would you feel good from one dose?

5 A. One dose? I can't shoot one dose, I wouldn't feel good
6 at all. I have to shoot about four or five doses.

7 Q. If you shot four or five doses, how long would that make you
8 feel good, do you know?

9 A. About six hours.

10 THE COURT: How long?

11 THE WITNESS: About six hours.

12 BY MR. FRONK:

13 Q. Now, during the six hours would you be able to talk to
14 your friends?

15 A. I don't know. Not necessarily, not in the same thing I
16 would if I was sober.

17 Q. Would you be able to drive your car?

18 A. I don't know.

19 Q. Could you go to a movie and watch a movie?

20 A. No.

21 Q. Could you watch television?

22 A. No.

23 Q. Talk to your girl friend?

24 A. I couldn't speak on it. It's according to how high I am.

25 Q. Do you recall going back -- having the agents take you and

1 Handley and Cole to a bank on that date?

2 A. No.

3 Q. You don't recall standing on front of people and having
4 them try to pick you out?

5 A. No.

6 Q. Do you recall driving your automobile on that date?

7 A. Yes.

8 Q. Do you know who Jim McGuigan is?

9 A. No.

10 Q. You never talked to him before?

11 A. I don't know who he is.

12 Q. Did you ever talk to any FBI agents?

13 A. I don't know. I just -- I don't know who I talked to. I
14 didn't talk to nobody.

15 Q. Have you ever talked to an FBI agent?

16 A. In my life?

17 Q. In your life.

18 A. You, I guess. I talked to you two years ago, that's the
19 only one I ever talked to.

20 Q. Did you ever talk to Jim Comfort?

21 A. No, not as I know of.

22 Q. Do you have any recollection at all of giving a statement
23 to the Buffalo Police Department or the FBI on the 26th?

24 A. No, I didn't.

25 Q. When were you taken to Magistrate Maxwell's?

1 A. I don't know. I just know I was there at night time, it
2 was dark.

3 Q. How did you feel?

4 A. I was sick.

5 Q. Did you feel down anymore?

6 A. No, I was shaking.

7 Q. You don't recall feeling shaky with the agents, do you?

8 A. I don't recall being with the agents.

9 Q. You don't recall talking to them for twenty minutes?

10 A. No.

11 Q. You don't recall being at the Buffalo Police Department?

12 A. No, I doesn't.

13 MR. FRONK: I have no further questions.

14

15 (Witness excused.)

16

17 MR. DOBSON: I call Diane Martin.

18

19 A R L E T H I A D I A N E M A R T I N , 609 Clinton
20 Street, Buffalo, New York, called as a witness on behalf of
21 the defendant Zachary Martin, and being first duly sworn,
22 testified as follows:

23 DIRECT EXAMINATION BY MR. DOBSON:

24 Q. Miss Martin, you are related to Zachary Martin, the defendant
25 in this action?

- 1 A. Yes.
- 2 Q. How are you related?
- 3 A. Sister.
- 4 Q. He is your brother?
- 5 A. Yes.
- 6 Q. Just relax. Do you remember being with your brother on
7 the 26th of November 1976?
- 8 A. Yes.
- 9 Q. All right. Do you remember what time of day it was that
10 you were with him?
- 11 A. Around noon.
- 12 Q. What, if anything, was your brother doing at that time?
- 13 A. He was shooting drugs.
- 14 Q. Shooting drugs?
- 15 A. Yes.
- 16 Q. Does your brother have a drug habit?
- 17 A. I would say so.
- 18 Q. How many drugs did he shoot that day?
- 19 A. About seven or eight, they were like -- I don't know --
20 tubes or whatever you call them.
- 21 Q. Have you seen your brother shoot these drugs like that
22 before?
- 23 A. Yes.
- 24 Q. What effect does that have on him in terms of ability to
25 talk?

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1 A. He forgets things he says. He does things over and over
2 again that he doesn't know what he was doing. He forgets
3 things, and he just doesn't act like he usually does.

4 Q. How would you describe his personality, is he very
5 enthusiastic and effervescent or -- describe in your own
6 words as best you can?

7 A. Evil, mean and delerious.

8 MR. DOBSON: That is all.

9 MR. FRONK: I have no questions, your Honor.

10 THE COURT: Thank you.

11 MR. GRASHOW: May I ask a couple of questions, your Honor?

12 MR. FRONK: Your Honor, I would object to Mr. Grashow
13 asking.

14 THE COURT: It depends on what you are going to ask.

15 MR. GRASHOW: I wanted to ask who else was present, your
16 Honor.

17 THE COURT: If any of the defendants were present?

18 MR. GRASHOW: Correct.

19 THE COURT: You may ask that.

20 CROSS EXAMINATION BY MR. GRASHOW:

21 Q. Dennis Martin is also your brother?

22 A. Brother.

23 Q. Did you see him on that day also?

24 A. Yes.

25 Q. Okay. Did you see him shoot any drugs that day?

1 A. Did I see him what?

2 Q. What did you see Dennis Martin do that day with respect
3 to drugs?

4 A. I didn't see much of him that day.

5 Q. Did you see him at all?

6 A. Yes.

7 Q. Did you see him do anything with respect to drugs at all
8 that day?

9 A. No.

10 MR. GRASHOW: Thank you.

11 THE COURT: Thank you.

12

13 (Witness excused.)

14

15 MR. DOBSON: Doris Stephens.

16 D O R I S S T E P H E N S , 138 Glenny Drive, Buffalo, New
17 York, called as a witness on behalf of the defendant Zachary
18 Martin, and being first duly sworn, testified as follows:

19 DIRECT EXAMINATION BY MR. DOBSON:

20 Q. Doris, do you know the defendant, Zachary Martin?

21 A. Yes, I do.

22 Q. Were you with him on the 26th day of November 1976?

23 A. Yes, I was.

24 Q. What time of the day was this?

25 A. About quarter to twelve.

1 Q. What, if anything, was Mr. Martin doing at that time?

2 A. We was getting high.

3 Q. What was Mr. Martin doing?

4 A. He was getting high with us.

5 Q. How was he getting high?

6 A. Oh, you know, we was shooting some Talwin.

7 Q. Have you seen Mr. Martin shoot Talwin before?

8 A. Yes.

9 Q. How many syringes did Mr. Martin shoot?

10 A. He had the biggest ones that we had. He shot about seven
11 or eight times right behind each other.

12 Q. Did you see him after he shot those Talwins?

13 A. Yes. He was messed up, you know, he wasn't in his right
14 mind like he usually be.

15 Q. What do you mean by "messed up," describe it?

16 A. His speech, you know.

17 Q. Could he talk?

18 A. You know, like if you were to get high you wouldn't be in
19 your right mind as you is now.

20 Q. The Court has to know what you mean by that, could he
21 talk?

22 A. Yes, he could talk. You know, he wasn't talking like he
23 will be talking, like he is.

24 Q. Can he carry on a conversation with somebody?

25 A. Not really.

1 MR. DOBSON: That is all I have.
2 MR. FRONK: I have no questions, your Honor.
3 MR. DOBSON: One other question, your Honor.
4 BY MR. DOBSON:
5 Q. Was anyone else present with Mr. Zachary Martin and yourself
6 when you were shooting the drugs?
7 A. Yes, his sister.
8 Q. Anyone else?
9 A. That's about all beside my sister and her boyfriend.
10 Q. Anyone else?
11 A. No.
12 MR. DOBSON: Thank you.
13 MR. FRONK: I have no questions, your Honor.
14 (Witness excused.)
15 THE COURT: Mr. Dempsey, do you have any witnesses?
16 MR. DEMPSEY: No, I don't, your Honor.
17 THE COURT: Mr. Grashow?
18 MR. GRASHOW: Yes, your Honor, one witness. Mr. Martin.
19 D E N N I S R E G I N A L D M A R T I N , 138 Glenney
20 Drive, Buffalo, New York, called as a witness on his own
21 behalf, and being first duly sworn, testified as follows:
22 DIRECT EXAMINATION BY MR. GRASHOW:
23 Q. Mr. Martin, you have heard Special Agent Gotter testify
24 here with respect to a statement he claims that you made
25 at Buffalo Police Headquarters on November 26th?

1 A. Yes.

2 Q. When you made that statement that he -- strike that. At
3 the time that he claims you made that statement were you
4 under the influence of any narcotics?

5 A. Yes, I was.

6 Q. What were they?

7 A. Talwins.

8 Q. And when had you taken that Talwin?

9 A. About nine-thirty, around there.

10 Q. Nine-thirty in the morning of that day?

11 A. Right.

12 Q. Who was with you at that time?

13 A. My brother Zachary, Danny and a girl named Peggy.

14 Q. And in what quantity did you take this Talwin?

15 A. I took about three and a half shots.

16 Q. And have you used this before?

17 A. Yes, sir.

18 Q. How often?

19 A. About four or five times a day.

20 Q. For how long a period of time?

21 A. Oh, about a year, year and a half.

22 Q. Okay. Did you use any other drugs?

23 A. Yes, I have.

24 Q. What are they?

25 A. I have used heroin, other barbiturates.

- 1 Q. On November 26th you took only Talwin?
- 2 A. I took Talwin and I had two nerve pills.
- 3 Q. And two nerve pills?
- 4 A. Yes.
- 5 Q. Do you know what kind of pills?
- 6 A. Valium, Roach Tens.
- 7 Q. Roach Tens?
- 8 A. Yes, sir.
- 9 Q. How did you feel that day?
- 10 A. I was very calm, very relaxed.
- 11 Q. Is that how you normally feel when you take this Talwin?
- 12 A. Well, if I just take Talwin by itself I would be real
- 13 nervous, I would need some sort of downer, a stimulant,
- 14 with the Talwin.
- 15 Q. Is that why you take the valium?
- 16 A. Yes.
- 17 Q. When you take the combination of these two drugs how do
- 18 you feel?
- 19 A. Very relaxed, you know, down.
- 20 Q. Are you able to carry on a conversation?
- 21 A. I can carry a conversation on, you know, not to the fullest
- 22 extent.
- 23 Q. Now, did there come a time that you recall being read an
- 24 Advice of Rights sheet by Special Agent Cotter, do you
- 25 recall this at all?

1 A. I recall talking to him. I didn't read it, I think he read
2 it to me.

3 Q. Do you recall signing anything that day?

4 A. No, not really. I don't really recall.

5 Q. And do you have a recollection of giving Special Agent
6 Gotter a statement of events?

7 A. I remember saying some things to him.

8 Q. Did you have a full understanding of all the things he
9 was saying to you?

10 A. I really don't have a full understanding of exactly what
11 was going on at all.

12 MR. GRASHOW: That is all I have. Thank you.

13

14 CROSS EXAMINATION BY MR. FRONK:

15 Q. Mr. Martin, where were you at ten-thirty on that morning,
16 the 26th of November 1976?

17 A. I'm not sure.

18 Q. Were you with Alphonso Handley?

19 A. I couldn't really say.

20 Q. Do you remember being with your brother Zach at any time
21 that morning?

22 A. Yes. I had been with him in the early morning, yes.

23 Q. Did you see Gary Cole that morning?

24 A. Yes, I seen him.

25 Q. Did the four of you go for a ride in Zach's car?

1 A. I refuse to answer that on the grounds it may incriminate
2 me.

3 MR. FRONK: He is on the stand, your Honor.

4 THE COURT: I think it is one thing to interrogate
5 concerning what he remembers doing and another
6 thing to cross examine concerning the merits
7 of the alleged crime where it is not gone into
8 on direct. I'm not sure in my own mind about the
9 usability of something that is brought forth
10 in a suppression hearing.

11 MR. FRONK: I think the rule is we can use it. He
12 takes his chances when he takes the stand, and
13 we can use admissions made in a suppression
14 hearing.

15 THE COURT: That is what I would think.

16 MR. GRASHOW: I think, your Honor, if the United States
17 Attorney was allowed --

18 THE COURT: I think the area you are going into, al-
19 though it has a bearing upon the direct exam-
20 ination, namely, going into his whole recollect-
21 ion of what was going on that day after he had
22 taken the drugs earlier in the morning, neverthe-
23 less, it can be adequately explored without
24 getting into the merits of the crime. Consequent-
25 ly, I am going to block you out from that.

1 MR. FRONK: You are going to restrict my cross exam-
2 ination of the defendant who has taken the stand
3 as to the events which are involved in the
4 indictment?

5 THE COURT: Yes.

6 MR. FRONK: I respectfully except to that. I won't
7 ask any further questions.

8 THE COURT: All right.

9 MR. GRASHOW: We have no other witnesses.

10 THE COURT: You do?

11 MR. GRASHOW: We don't have any other witnesses. We
12 rest.

13 THE COURT: Anything in rebuttal?

14 MR. FRONK: I might have, your Honor. I need some
15 time. I may take the stand. I would like to
16 have permission to go downstairs and see if I
17 can find someone to conduct a direct examination,
18 if that is our choice. Could I have five minutes?

19 MR. DOBSON: Before we do that, it is my understanding
20 Mr. Fronk is going to testify as to events
21 that happened in his office between my client
22 and himself, which came out during cross exam-
23 ination, in terms of --

24 THE COURT: Two years ago.

25 MR. DOBSON: Two years ago. I think it is a collateral

1 issue. I don't see the relevance and, as a
2 collateral issue, it should be excluded any way.

3 THE COURT:

4 I don't know how collateral it is. Zachary
5 Martin indicated that he had been taking drugs
6 for three and a half years, and placed the time
7 of this interview within that time span. The
8 only thing is I wonder what you could add to
9 it. It seems to me that Mr. Martin, himself,
10 was pretty much admitting that he knew what
11 was going on when he talked to him for a couple
12 of hours.

13 MR. FRONK:

14 That would only serve to amplify the
15 physical characteristics which he demonstrated
16 in terms of voice pattern, eyes, speech, nervous-
17 ness, if any, because that is obviously the
18 issue. It couldn't be more relevant to Mr.
19 Grashow's and Mr. Dobson's allegations against
20 the statements.

21 MR. DOBSON:

22 I would say, your Honor, we are talking
23 about a meeting which my client has admitted
24 to. I don't see where he disagreed with any
25 of the questions asked by Mr. Fronk. He spoke
with him, he remembers certain parts of the
discussion, the discussion that took place two
years ago. There was no cross examination with

1 respect to what his habit was two years ago,
2 there is nothing in there about that.

3 THE COURT:

4 The way the thing comes through to me is
5 that two years ago he had a two hour conversation
6 with you in your office, with Charlene Green
7 present, that he was having no problems convers-
8 ing with you or knowing what was going on, or
9 sitting here now and remembering the fact he
10 had the conversation.

11 MR. FRONK:

12 Exactly, and he did not exhibit any impaired
13 speech pattern or eyes or perspiration or drug
14 related symptoms that I, as a lay person, would
15 observe, and that is coupled with his testimony
16 that he has been on these every day for the last
17 three and a half years. I didn't go back to
18 when he was eight years old, I'm going back
19 two years, and that was his answer to my ques-
20 tion.

21 THE COURT:

22 The further thing you are going to add is
23 the aspect of the normality of his physical
24 appearance and his physical actions, and there
25 is nothing that is in the case yet that is to the
contrary. There has been questioning here trying
to bring out from the agents whether they have
had training in observing this, that and the

1 other thing, but the whole testimony here is
2 that there was nothing of any bad or abnormal
3 appearance.

4 MR. FRONK: That is correct.

5 THE COURT: You would say the same thing.

6 MR. FRONK: That is correct.

7 THE COURT: Taking into consideration what you want
8 to do, I think you add nothing to what we have
9 here now.

10 MR. FRONK: I think that perhaps you are right, your
11 Honor, because I will only characterize a set
12 of descriptive factors that have been gone into
13 by three witnesses. We will rest.

14 THE COURT: All right. Now, I have told Mr. Baker
15 that we would not have argument today and that
16 we would set up a time for having argument.
17 I don't know when you want to do that, whether
18 you want to do it next week. I actually set
19 up a trial, I think, on May 10. I think we
20 ought to argue this while it is fresh in our
21 minds. I could do it later this week. I could
22 do it on the 23rd, 24th or 25th at any time.

23 MR. GRASHOW: Your Honor, I am supposed to begin a trial
24 in the State Supreme Court tentatively the 23rd.
25 If it doesn't start the 23rd, 24th or 25th, I am

1 told I am off until April 11th. What I would
2 like to do if possible, could we go the week
3 after, the 23th?

4 THE COURT: Then I am starting a trial that is supposed
5 to last six weeks. Monday the 23th I have my
6 normal calendar, and there is a suppression
7 hearing in a criminal case at two-thirty. April
8 4 I don't see any such complication. If you
9 want to have the argument on April 4 --

10 MR. GRASHOW: That would be fine, your Honor.

11 MR. FRONK: What day is that?

12 THE COURT: Monday. About two-thirty?

13 MR. GRASHOW: Fine, your Honor. Thank you, your Honor.

14 MR. DOBSON: Thank you, your Honor.

15 MR. DEMPSEY: Thank you, your Honor.

16 MR. FRONK: Thank you, your Honor.

17
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19 * * * * *

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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3 -----
4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 -vs-

Cr. 77-11

7 GARY COLE, et al.,

8 Defendants.
9 -----

10 Proceedings in the above entitled action held before
11 the HON. JOHN T. ELFVIN, United States District Judge, in and
12 for the Western District of New York, at Buffalo, New York, on
13 May 9, 1977.

14 APPEARANCES:

RICHARD J. ARCARA,
United States Attorney, by
JAMES A. FRONK,
Ass't. United States Attorney,
Appearing on behalf of the Government.

17 PATRICK J. BAKER, ESQ.,
Appearing on behalf of the defendant
18 Gary Cole.

19 JOHN DEMPSEY, ESQ.,
Appearing on behalf of the defendant
20 Alphonso Handley.

21 MURRAY J. GRASHOW, ESW.,
Appearing on behalf of the defendant
22 Dennis Martin.

23 ARTHUR F. DOBSON, ESQ.,
Appearing on behalf of the defendant
24 Zachary Martin.

25 * * * * *

1 CLERK: United States versus Cole, Handley, Martin and
2 Martin, Criminal 77-11.
3 THE COURT: All right. Where do we stand, we are set to draw
4 a jury tomorrow.
5 MR. GRASHOW: Your Honor, on behalf of Dennis Martin, we would
6 not be ready tomorrow. As the Court knows, we
7 had certain pretrial hearings, and at the con-
8 clusion of those hearings I personally asked
9 the Court to allow us to order copies of the
10 transcripts so that we would have adequate
11 time to study them and use them for whatever
12 purposes needed for trial. The Court at that
13 time advised that we would not have them at
14 that time, there would be adequate time to
15 receive those transcripts for proper preparation.
16 We have not to date received any transcripts.
17 The Court is asking us to pick a jury tomorrow,
18 and I am further advised by Mr. Walsh that we
19 will be the first case out, following jury
20 selection we will commence the case. On behalf
21 of Dennis Martin, I feel the transcripts, par-
22 ticularly the one that was held before the
23 Magistrate in a preliminary hearing, would be
24 crucial to our defense, and not having, one,
25 the time to review that transcript or, two, the

1 transcripts from the other pretrial hearings
2 held before this Court, would cause us severe
3 prejudice and I think put us in a position which
4 would be unfair to the defendants. I on behalf
5 of Dennis Martin ask the Court to adjourn these
6 proceedings to give us adequate time to study
7 the transcripts and to accordingly prepare our-
8 selves for trial. Also, your Honor, there are
9 other matters related to the case which have
10 not been resolved. One, we have not seen any
11 written decisions with respect to the Court's
12 rulings on our motions. The only reason I
13 suggest that we should see those written decisions
14 is that it may very well be, based on the Court's
15 finding of facts and conclusions of law, that
16 there would not be -- we would be satisfied
17 with the Court's conclusions and may cause the
18 defendants to enter into a plea situation.
19 Secondly, your Honor, there are certain discovery
20 materials which we have not seen, which we under-
21 stand Mr. Fronk may be using in his case, to wit,
22 the examination of a hat that was allegedly
23 seized, and also there were some discussions
24 with respect to the automobile, I believe, is
25 that correct?

1 MR. BAKER: Right. I believe in Mr. Frank's papers there
2 was a mention of some laboratory test being
3 performed on the automobile. It is usually
4 customary in a bank robbery where an automobile
5 is seized that the FBI or local authorities go
6 over it and dust for prints. We have not received
7 any word whether in fact that occurred, did not
8 occur, or if it did occur, what the results of
9 those laboratory tests were.

10 MR. GRASHOW: For those reasons and the reasons I stated
11 earlier, I would on behalf of Dennis Martin
12 request an adjournment of this matter. Thank
13 you.

14 MR. BAKER: If I may be heard on behalf of the defendant
15 Cole, likewise I would join in the request,
16 based upon the inability to review the trans-
17 cripts. I would say, as far as I am concerned,
18 in my position that the Magistrate's transcript
19 would be critical to me for the following reason.
20 Naturally, in any case such as this, one of the
21 main issues is the identification of the indi-
22 vidual or individuals committing the crime. At
23 the Magistrate's proceedings and then at the
24 proceedings we have had before your Honor or
25 the suppression of identification testimony

1 issue, certain in court identifications were
2 made by various witnesses, and I am particularly
3 thinking of one now by Frank Garwol, and there
4 is a discrepancy in those identifications.

5 THE COURT: I understand from Mr. Fronk that there will not
6 be identification testimony by Mr. Garwol.

7 MR. FRONK: Not on our direct examination there will not
8 be.

9 MR. BAKER: well, I may call him. I just need that oppor-
10 tunity. Furthermore, if I could amplify that,
11 we have here a person identifying somebody at
12 one point and failing to identify somebody at
13 another point, so once again that is critical
14 to the identification issue. The other issue
15 which I am confronted with, we did mention this
16 at the end of the hearing before your Honor, is
17 a severance issue. Two of the defendants, the
18 Martins, made statements incriminating --
19 speaking directly to my client, and I believe
20 they incriminate your client, too?

21 MR. DEMPSEY: Yes.

22 MR. BAKER: My client, in turn, makes a statement which is
23 what I would consider an exculpatory statement.
24 I feel that because of the statements of the
25 Martin brothers incriminating my client that

1 there is a real Bruton issue. The statements
2 come to police authorities, so it can in no way
3 be considered part of the conspiracy. For that
4 reason I feel the cases have to be severed if
5 they are going to trial, your Honor.

6 THE COURT:

Mr. Dobson?

7 MR. DOBSON:

Yes, your Honor. The only thing -- I would
8 join in the motions of co-counsel -- I would
9 just add that I raised on the motion the issue
10 of the Harris case, and for me, I would -- I
11 don't know how your Honor is approaching that
12 particular issue, whether --

13 THE COURT:

There are two things in connection with Harris.
14 One, I think any matter of production of notes
15 would be a matter faced on trial, and pursuant
16 to the Second Circuit decision in United States
17 versus Sebastian, where it was held that there
18 is no compulsion on the Government to make these
19 statements available in connection with any
20 pretrial hearing. Now, admittedly it possibly
21 can be said that it is reachable now because
22 there was testimony by a couple of the agents
23 anyway that the notes had been destroyed. So
24 in effect we had the question of the destruction,
25 rather than technically the non-compliance with

1 3500. Nevertheless, I have said before and
2 say again that I am not following the United
3 States versus Harris. There is nothing of a
4 similar nature that is controlling upon me
5 either by the Supreme Court of the United
6 States or by the Second Circuit, recognizing,
7 of course, that the Second Circuit has said
8 that it is better practice not to destroy, they
9 said that in United States versus Thomas, and
10 it should be left to the Courts to decide whether
11 something is producible or discoverable, and not
12 left up to the FBI. Nevertheless, there hasn't
13 been any mandate controlling on me, as the
14 Harris mandate is controlling upon those courts
15 in the Ninth Circuit, that it is wrongful to
16 destroy the notes. So as far as Harris is
17 concerned, I am not following that, and you can
18 raise it again on trial. The Sebastian case,
19 I am sure you are familiar with it, is 497 Fed.
20 2nd 1267, and Thomas is 232 Fed. 2nd 191. Now,
21 what else do you have?

22 MR. DOBSON: That is the only addition I would have to the
arguments of counsel.

24 THE COURT: Mr. Dempsey?

25 MR. DEMPSEY: Your Honor, on behalf of Alphonso Handley, it

1 is my understanding that the Government is only
2 going to call the one girl to testify as to the
3 identification against him, and the court reporter
4 has informed me that the testimony will be pro-
5 vided to me tomorrow morning.

6 THE COURT: Sarah Johnson?

7 MR. DEMPSEY: That is correct. I don't anticipate that a
8 review of that document, as far as her testimony
9 is concerned, will take me over a half hour. I
10 haven't checked with the Magistrate's Office
11 to determine if the transcript is ready down
12 there. If it is, I will be prepared on that.
13 However, I do want to bring home and make it
14 especially clear at this time in the record the
15 Bruton argument, to make sure that it is on the
16 record. The only evidence against my client,
17 Alphonso Handley, is the somewhat shakey identi-
18 fication of Miss or Mrs. Johnson -- it escapes
19 me at the moment whether she is married or not --
20 and the statements made by the two co-defendants
21 to the FBI agents, and it is my understanding
22 that under that Bruton case my gentleman should
23 not be tried with those individuals making the
24 statement. As far as preparation is concerned,
25 if I am not here I would be someplace else, it

1 doesn't bother me. I am quite concerned about
2 the Bruton case as it relates to Mr. Handley.
3 MR. GRASHOW: On behalf of Dennis Martin, your Honor, I would
4 certainly also join in the request of co-counsel,
5 under the guise of Bruton, and ask for a severance
6 also. Thank you.
7 THE COURT: Well, Mr. Fronk, I don't know what the contents
8 of these statements are. I know originally
9 there had been some talk about two of the state-
10 ments, I think, being exculpatory.
11 MR. FRONK: Those are Cole's and Handley's statements.
12 THE COURT: What is your position?
13 MR. FRONK: Your Honor, as concerns the confessions, there
14 are two confessions, one by each of the Martin
15 brothers, which are full and complete, and
16 involve all four defendants from the inception
17 of the idea to go and rob something through
18 the abortive attempt to rob the bank in question
19 in this indictment. I would cite to your Honor
20 United States versus Anderson, a Supreme Court
21 case, in support of trying them all on Count
22 2 of the indictment, which is a conspiracy to
23 rob a bank. Anderson states that statements
24 made by one defendant either before the con-
25 spiracy, during the conspiracy or after it has

1 been stopped by law enforcement, are usable
2 against other defendants and outside the scope
3 of Bruton, as long as I have some independent
4 evidence tying the man to the conspiracy. Now,
5 the toughest case is Handley under that theory,
6 and I think Sarah Johnson's identification of
7 him at the bank, around the bank, coupled with
8 the testimony that two tall, slender black
9 males were seen running from the bank thereafter,
10 and Handley's subsequent apprehension with the
11 other defendants, is enough independent evidence
12 to get me over the threshold problem of Handley's
13 involvement. As concerns the defendant Cole,
14 there will be three eyewitness identifications,
15 including the victim teller, which will put him
16 in the bank and leaving the scene, and he will
17 be found with the others in the apartment. I
18 think there is a tremendous amount of evidence
19 to get him in a conspiracy independent of the
20 two confessions. The Martin brothers we make
21 no allegations were ever in the bank proper
22 itself. Our contention is that they were in
23 on the conversations, and that contention is
24 based on their statements, and they then drove
25 the getaway car, which was registered to one of

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OFFICIAL REPORTERS, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

1 the two of them, all four were found together
2 a half hour later. I think given the facts of
3 this case it would be much easier to try all
4 four of them on the conspiracy count at once.
5 As far as the substantive count, we've got
6 Cole charged with an attempted bank robbery,
7 and the other three with aiding and abetting.
8 The only person who I can see we would have a
9 problem with under Bruton in that case would be
10 the Martin brothers, where there is no indepen-
11 dent evidence, other than their confession,
12 except the fact the car is registered to one
13 of the two of them, there may be a problem in
14 that. As far as the discovery, I thought
15 everyone was aware at the start of the suppression
16 hearing that I turned over the handwriting
17 results, and I turned over the results of the
18 fingerprint tests which were positive for three
19 of the defendants. At that time I orally stated
20 that I did not follow up with another supple-
21 mental discovery response, that we had nothing
22 positive in the examination of hairs inside
23 the hat for a variety of reasons, there wasn't
24 enough of a sample, there wasn't anything con-
25 clusive from what they had, and there were no

1 fingerprints in the getaway car. In fact, it
2 was never checked for fingerprints.

3 THE COURT: You say you did turn over a handwriting test?

4 MR. FRONK: Gary Cole, who we believe was the man who went
5 to the victim teller, allegedly had a note in
6 his hand, and there was a comparison between
7 the handwriting on the note and the sample
8 from him, and the tests were inconclusive. I
9 gave that to Mr. Baker.

10 MR. BAKER: I am in receipt of that.

11 MR. FRONK: There was no handwriting involved with any of
12 the others.

13 THE COURT: You say no fingerprints were found in the
14 automobile?

15 MR. FRONK: My inquiries show that the automobile was
16 never checked for fingerprints, so I don't
17 have any fingerprints from there.

18 THE COURT: All right.

19 MR. BAKER: Could I ask this with regard to that issue,
20 not that I am doubting your word, but did you
21 ever talk to the FBI agent in charge of the
22 case?

23 MR. FRONK: I have no doubt that the car is full of finger-
24 prints of the Martin brothers because they own
25 the car and use the car every day. That was

1 the reason given for the non-check of that car
2 for fingerprints.

3 THE COURT:

4 Now, as far as the oral statement of Dennis
5 Martin, my findings in that regard were, and
6 are that he was fully apprised of his constitu-
7 tional rights by Special Agent Goddard, and the
8 rights form was read by Dennis Martin, Dennis
9 said he could read, and he signed the rights
10 form, and as far as the agent, he gave every
11 appearance of appearing to be mentally competent
12 and understanding what was going on, and not
13 being high on drugs, and I know he
14 stand and said that he had been on d. . . I
15 didn't really understand what was going on but
16 he admitted that the rights were read to him,
17 and said he, himself, did not read the form.
18 I find that there is nothing in that that could
19 cause me to suppress the oral statement made
20 by Dennis Martin. As far as Mr. Cole, his
21 rights were read to him by Special Agent Magness,
22 and he told Mr. Magness that he understood his
23 rights as read to him, and he signed the rights
24 form, there was no request by him for an attorney,
25 and consequently I find that any oral statement
made by Mr. Cole would be receivable. The

1 defendant Handley, he was interviewed by Special
2 Agent Davidson, and again his rights were read
3 to him, and Handley signed the rights form
4 indicating that he did understand and did waive.
5 He couldn't read but he said he did
6 understand, and again there was no request for
7 an attorney. I find that any oral statement
8 made under those circumstances by Handley is
9 sufficient. Zachary Martin had his rights
10 read to him by Special Agent McGuigan, and
11 Zachary Martin signed the FBI rights form.
12 McGuigan said he knew that Zachary Martin was
13 a drug user but there was no signs of any with-
14 drawal or sickness, nor any statement by
15 Zachary Martin that he was in either such
16 situation. There was, of course, testimony
17 by him and by two others indicating that he
18 had taken certain quantities of drugs that
19 morning and didn't know what he was doing, but
20 that, of course, would be for the jury to deter-
21 mine, and they would be told, of course, that
22 they could not consider any statement given if
23 they found that the statements were not given
24 voluntarily. So again I find there is suffi-
25 cient to show, if the jury does come to that

1 conclusion, there is certainly sufficient
2 evidence for the jury to so find that they had
3 been given voluntarily and they had been given
4 the full notice of their rights. As far as the
5 identification, we have identification of Handley
6 by Sarah Johnson, the teller. She said she
7 saw him for three or four seconds, and took
8 particular notice of him as he walked by the
9 rear of the bank. Admittedly, she saw him not
10 again until he was standing with three other
11 defendants in the bank. It was important to
12 me that she did not have to make use of the
13 hat which was passed around and among the four
14 men in order to identify him, and made the
15 identification quite clearly. Again, it would
16 be up to the jury to evaluate that. As far
17 as Cole is concerned, she said she saw Cole
18 inside the bank when he came up to her window,
19 she was waiting on a customer, and Cole stood
20 directly behind that customer, and Cole was
21 directed by the head teller to the common line,
22 and again she picked him quite readily from
23 among the four men as they stood in the bank,
24 and without the utilization of the hat. Douglas
25 Murdoch, who was unable to identify Cole in

1 the courtroom, had identified one defendant
2 when the four of them stood in the bank. This
3 was the man who stood at the tellers window
4 very close to Mr. Murdoch. In fact, Mr. Murdoch
5 said he brushed by him in the bank, and was
6 suspicious of Cole, and waited in his car out-
7 side and watched the man come out of the bank
8 and then run down the street. He was helped
9 in making the identification by the hat being
10 placed on Mr. Cole. Also he admitted that he
11 had not seen Cole's face outside the bank.
12 Special Agent McGuigan testified that it was
13 Cole who was clearly identified by Murdoch at
14 the bank. Elizabeth Malary, the head teller,
15 saw Cole come behind the customer whom she was
16 waiting on, and she had asked Cole to wait in
17 line, and then Cole went to stand right behind
18 the customer at Sarah Johnson's window, and
19 she noted particularly that Cole appeared to
20 be angry at her, and the man then came to
21 Malary's window and presented the note, she
22 pretended to faint, and she identified Cole
23 from among the four in the bank, admittedly
24 through the utilization of the hat. In the
25 courtroom she was not sure of her identification

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1 of Cole. Again, Special Agent McGuigan testi-
2 fied that Malary did identify Cole at the bank.
3 Now, again, I see nothing in the testimony of
4 any of those three, as far as the identification
5 of Cole, that would be suppressed. Again, it
6 would be completely up to the jury to decide
7 the credibility and sufficiency of that identi-
8 fication, but I do not suppress it. Mr. Grashow,
9 you at one point had said that Dennis Martin
10 should undergo a test for his competency to
11 stand trial, I don't know if you press that or
12 not. I know Dennis Martin took the stand, and
13 in my evaluation of him as he was testifying,
14 I could see no justification for having any
15 such test. Whether there is anything else,
16 I don't know.

17 MR. GRASHOW: If I recall correctly, your Honor, FBI Agent
18 Goddard testified with respect to Mr. Martin
19 and stated that he could not be sure that
20 Dennis Martin was not under the influence of
21 drugs at the time the statement was given, and
22 I think, if I recall correctly, my remarks were
23 that we should at that point have a hearing to
24 determine whether or not he was in fact under
25 the influence of drugs and thereby unable to

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3 THE COURT:

4 give a competent statement of events, and I
5 would still maintain that position, your Honor.
6 Well, what additional hearing would you have?
7 We have had testimony by Mr. Goddard, that
8 aspect was gone into, and I think also when
9 Special Agent McGuigan took the stand, as he
10 did in connection with his interview of Zachary
11 Martin, you took the opportunity to ask him
12 about Dennis Martin. Dennis, himself, said
13 that he was on drugs, and said while he could
14 talk, he did not really understand what was
15 going on with Goddard, but he admitted Goddard
16 read the rights form to him, he said he, himself,
17 did not read the form. What more could we
18 have?

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25 MR. GRASHOW:

It seems to me that both agents when they
testified indicated their training was such as
they were able to identify a person who is
coming down from a high caused by the use of
drugs. They gave the classic example of a
running nose, watery eyes, things of that
nature, vomiting, but neither of them were
able to state with any expertise as to what
the characteristics are of a person who is
high on drugs when they were interviewing such

1 a person. I think it might be beneficial to
2 the Court and the defendants to determine
3 medically what kind of characteristics does a
4 person manifest when he is high on drugs, what
5 effect it would have on his ability to talk
6 coherently or understand the nature of the pro-
7 ceedings which are going on, in that case an
8 interview for him to give an inculpatory state-
9 ment about robbing a bank. I think some of
10 those factors, your Honor, might be very helpful
11 and should be brought out to the Court to make
12 that determination.

13 THE COURT: What evidentiary vehicle would you use for that?

14 MR. GRASHOW: By name, I don't know, your Honor. I suppose
15 I would just label it very generally pretrial
16 hearing to determine the --

17 THE COURT: What other evidence would you put in, other
18 than what we have?

19 MR. GRASHOW: Possibly medical testimony, possibly --

20 MR. FRONK: It wouldn't be relative. I couldn't agree with
21 the Court more. The very hearing Mr. Grashow
22 is asking for is already had. All the partici-
23 pants who were there at the time the statement
24 was given have already spoken, including the
25 defendant. We would have a third party medical

1 expert, who would testify if a man was thus
2 and such, then he might have these symptoms,
3 and we have already heard the way he appeared
4 to be from both sides on the stand. I think
5 it would be a waste of time.

6 MR. GRASHOW: We have the defendant stating that he did not
7 understand, that he was under the influence of
8 drugs. We have the one FBI agent, Agent Goddard,
9 stating he doesn't know whether the defendant
10 was under the influence or not. We have a
11 third FBI agent, Agent McGuigan, I believe
12 stated the defendant was not but gave the same
13 characteristics as a person coming off a high
14 from drugs, as opposed to being high on the
15 drugs. I would think, your Honor, there hasn't
16 been any conclusive evidence shown. I don't
17 think that at the time we had this hearing we
18 were -- we knew in advance what Agent Goddard
19 was going to say. We were not prepared at that
20 time to go further with respect to that question.
21 We were awaiting the Court's decision to deter-
22 mine whether or not that was an area in which
23 the Court thought we ought to explore further.
24 I think that medical testimony, possibly a
25 physical examination to determine whether or

1 not Mr. Dennis Martin is in fact a drug addict
2 may be helpful to the Court, probably would be
3 helpful to the Court. I would suggest that that
4 would be a proper pretrial hearing for this
5 Court to have.

6 THE COURT: I can't see that that is so, but I will turn
7 it over in my mind. Now, on the matter of
8 severance --

9 MR. FRONK: Your Honor, before we go on, so your records
10 are accurate, Sarah Johnson would offer two
11 pieces of identification testimony against
12 Alphonso Handley, one from the rear of the bank
13 when she was on her break, the second when she
14 went back on duty and glanced through the front
15 window and saw him in front.

16 THE COURT: Yes. I admit that is in the case, but I don't
17 give that much mileage as giving her an oppor-
18 tunity to see him.

19 MR. FRONK: As long as your Honor is aware that that would
20 come out.

21 THE COURT: I am aware. We had all the testimony about
22 signs on the window and all that. I am basing
23 my holding or non-suppression of her identifica-
24 tion testimony on the three or four second
25 observation of Mr. Handley while she was having

- 1 her coffee in the rear of the bank, and that
2 she noted him particularly because she became
3 suspicious. Now, what about severance?
- 4 MR. FRONK: Well, your Honor --
- 5 THE COURT: You have suggested one way of trying the case
6 on the conspiracy count only.
- 7 MR. FRONK: We have a real problem in the substantive count
8 with the confession, there is no question about
9 that.
- 10 THE COURT: How about trying the substantive count? Now,
11 Zachary Martin made a statement, as I understand,
12 which inculcates all four?
- 13 MR. DOBSON: Yes, sir.
- 14 THE COURT: Dennis Martin, the same thing, as I understand
15 it?
- 16 MR. GRASHOW: Basically, your Honor, yes.
- 17 MR. FRONK: Yes.
- 18 THE COURT: Isn't it more practical to severe and try the
19 two Martins on the indictment?
- 20 MR. FRONK: We could try -- you mean try the two Martins
21 alone on Count 1 of the indictment, aiding and
22 abetting an attempted bank robbery? That is
23 the substantive count.
- 24 THE COURT: And Count 2.
- 25 MR. FRONK: We could try them on Count 2 except that they

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1 are charged in a conspiracy, and I think we've
2 got to have all the conspirators when we try
3 a conspiracy.

4 THE COURT: You've got their own statements saying all four
5 were in the same boat. Many times you have
6 unindicted co-conspirators. Why do you have
7 to have them being tried in the particular
8 trial. Sometimes an indicted conspirator will
9 have fled prior to trial.

10 MR. FRONK: We can do it that way as long as we don't have
11 their confession on the substantive count, which
12 brings in Cole and Handley. In other words --

13 THE COURT: Cole and Handley are not being tried at this
14 time.

15 MR. FRONK: I understand that, and then try those two at
16 the same time on Count 2, that they conspired to
17 rob that bank.

18 THE COURT: Try the two counts against the two Martins.

19 MR. FRONK: We will still wind up having three trials.
20 We've got to try Cole separately and Handley
21 separately.

22 THE COURT: No, because Cole has not inculcated Handley,
23 and Handley has not inculcated Cole.

24 MR. BAKER: That is right.

25 THE COURT: They could be tried together, as long as the

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1 Martins have been disposed of.

2 MR. GRASHOW: Very easily.

3 MR. FRONK: The Martin brothers' statements will be used

4 at trial against Cole and Handley.

5 MR. DOBSON: How?

6 MR. GRASHOW: Under what theory?

7 MR. FRONK: Well, a statement of a co-defendant. If he

8 is not tried in that case, I can use his state-

9 ment as given to the FBI agents for the other

10 ones. We certainly would not be precluded

11 from arranging an order of trial so that the

12 confessions which implicates everybody could

13 be used, that was not the intent of Bruton.

14 It was only so that you wouldn't prejudice

15 the two fellows at the same trial.

16 MR. BAKER: The only way you could use the statements of

17 the Martins is if they got on the stand to

18 testify.

19 MR. DEMPSEY: And so that I have an absolute right to cross

20 examine them. I think that is what the theory

21 and the thrust of Bruton was and is and always

22 has been.

23 THE COURT: Once the Martins have been disposed of then,

24 of course, they can be put on the stand, either

25 way.

1 MR. FRONK: I can also use their confessions against the
2 others in the conspiracy count.
3 THE COURT: Once you establish the conspiracy, that is
4 right.
5 MR. FRONK: As far as the substantive crime --
6 THE COURT: You could not use their statements to establish
7 a conspiracy.
8 MR. FRONK: No, I can't. I would have to have independent
9 evidence. It doesn't necessarily have to come
10 in first, but at some point in the direct
11 proof I've got to put it in. I have already
12 made my argument that I think I have enough
13 independent on Handley and Cole to use the
14 Martin brothers' confession in the conspiracy
15 count.
16 THE COURT: I would have to judge after I saw what you had.
17 MR. FRONK: As far as trying the Martins separately on
18 Count 1 and then Cole and Handley and Count 1 --
19 THE COURT: Try the Martins on Counts 1 and 2. Of course,
20 you could try Handley and Cole on Count 1 and
21 2.
22 MR. DOBSON: There is no independent evidence, other than
23 Zachary Martin's confession.
24 THE COURT: I don't know, it is either there or not. If
25 you are able to establish a conspiracy by

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1 sufficient degree that I will let you put in
2 the Martins' statement or you put them on the
3 stand.

4 MR. FRONK: That would be in the trial against Cole and
5 Handley?

6 THE COURT: Yes, that is the second trial. We've got a
7 new bunch of jurors, we will bring them in and
8 try the two Martins this week. I don't know
9 what the situation is with the transcript.
10 Mr. Dobson, Mr. Grashow, I don't know what
11 the situation is with the Magistrate's tran-
12 script, what word do you get on that? He,
13 himself, stiffarmed it for a while because he
14 had something else going.

15 MR. GRASHOW: Apparently.

16 MR. FRONK: I know Mr. Dempsey made a written request on
17 the 31st of March for it.

18 MR. DEMPSEY: Yes, I did, your Honor, and then your Honor
19 asked Mr. Noel to hold up, and we also informed
20 the Magistrate to hold up pending your decision.

21 THE COURT: I know the Magistrate had something else he
22 wanted to do and couldn't get it out.

23 MR. DEMPSEY: That is unknown to me.

24 MR. FRONK: I went to see him Wednesday when it became
25 apparent that we might get to the deadline, and

1 he said, 'We did hold up, now we have a short
2 transcript of some type that we are appending
3 to a Second Circuit brief, and as soon as I
4 get the word we will have the girls get on it.
5 It appears that it will take them some time,
6 I don't know how long. It went the better
7 part of an afternoon, and we did come back and
8 had two -- I would say we have six hours, we
9 have four cassettes, and it is forty five
10 minutes a side. I went down wednesday to
11 check.

12 THE COURT: As far as what we have here, as far as the two
13 Martins are concerned, we have only the testi-
14 mony of probably four special agents, those
15 involved in taking the statements, there is
16 nothing else that was pertinent at all.

17 MR. GRASHOW: Correct, your Honor.

18 THE COURT: You have the testimony of Zachary and his
19 sister and friend, I don't think you need or
20 want that. What you need is the transcript of
21 what the agents said.

22 MR. DOBSON: Correct, your Honor.

23 THE COURT: The same thing as far as you are concerned,
24 Mr. Grashow?

25 MR. GRASHOW: Yes.

1 THE COURT: You don't need the transcript of what Dennis
2 Martin said.

3 MR. GRASHOW: Correct.

4 THE COURT: If we draw the jury and then give you those
5 transcripts in hand before we start, I think
6 you are protected on it.

7 MR. GRASHOW: Whatever the Court orders, we will be ready,
8 if that is the order of the Court.

9 MR. FRONK: Are those transcripts you are speaking of the
10 transcripts from our hearing, they have nothing
11 to do with the transcripts from the Magistrate's
12 court?

13 THE COURT: No, they don't, that is right. Again, we are
14 going to have to --

15 MR. DOBSON: Agent McGuigan for one testified --

16 THE COURT: I am talking about the testimony here when I
17 am saying four agents. Actually Goddard and
18 McGuigan, they were the two on both. McGuigan
19 interviewed Zachary with Goddard present, and
20 Goddard interviewed Dennis with McGuigan present.
21 You have those two special agents. Now, we
22 can find out then what the situation is down-
23 stairs and let you have whatever transcripts
24 you need in hand before we physically start
25 the trial.

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- 1 MR. DOBSON: I was wondering, I don't know how the two of
2 us can be tried together, given the proof.
3 All we have are the two statements basically.
4 We have that fingerprint on a piece of paper
5 and the fact that Zachary Martin's car was used.
6 There is no way that the United States Attorney
7 can tie the fingerprint on the piece of paper
8 with being exclusively used in the bank robbery.
9 It could be a piece of paper taken from his car.
- 10 MR. FRONK: The piece of paper says, "Stick-up or die,"
11 it's the demand note.
- 12 MR. DOBSON: No question about it, but I think the real
13 problem is how are you going to show --
- 14 MR. GRASHOW: Show they saw it before.
- 15 MR. DOBSON: -- the fingerprint was placed on it when the
16 demand note was written or afterwards?
- 17 THE COURT: That is his problem.
- 18 MR. FRONK: I personally don't think it is my problem, it
19 is their problem on defense.
- 20 THE COURT: You've got to prove the case.
- 21 MR. DOBSON: Given that, I don't know, your Honor, I would
22 still think Murray and myself are entitled to
23 a severance because of the evidence.
- 24 THE COURT: From each other?
- 25 MR. DOBSON: Yes, the only evidence they have is my statement

1 against my client, and his statement against
2 his client.

3 THE COURT: Both of the statements are saying, 'We all did
4 it.'

5 MR. FRONK: There is good law in the Second Circuit that
6 if both defendants give confessions, I can
7 try them at once as long as each one inculcates
8 the other. Your Honor's ruling, so I understand
9 it, is that Cole and Handley would be tried
10 separately on Counts 1 and 2, and on the con-
11 spiracy count, Count 2, I can use the Martin
12 brothers confession as statements in furtherance
13 of the conspiracy, but I can't use them in
14 Count 1 unless one of the Martins testifies?

15 MR. BAKER: No, that is not my understanding.

16 THE COURT: On Cole and Handley?

17 MR. FRONK: On Cole and Handley.

18 THE COURT: Yes, that is right, you can't use those state-
19 ments on Count 1 unless they take the stand,
20 and you can't use them to prove the conspiracy
21 under Count 2 unless one takes the stand. If
22 you prove the conspiracy separately, and I
23 am satisfied, I will let those come in as being
24 co-conspirators' statements, and they can be
25 used with the jury.

1 MR. FRONK: And that would be subject to connection in my
2 direct case?

3 THE COURT: Yes. I don't know as much for letting it in
4 subject to connection as making you prove a
5 certain level, then I will let it in.

6 MR. BAKER: Just to interject a thought. It is my under-
7 standing in the first instance that the trial --
8 speaking generally now -- your Honor would
9 first have to find the conspiracy. It is my
10 understanding that the statements are clearly
11 post conspiratorial statements, I mean they
12 are after this conspiracy is terminated, they
13 are not made in furtherance of it.

14 THE COURT: That would be part of my determination. Obviously,
15 I am not merely going to be satisfied that there
16 was at some time a conspiracy. The conspiracy
17 would have to continue until the point when
18 these statements were given, and the statements
19 must have been given pursuant to the conspiracy --

20 MR. BAKER: Right.

21 THE COURT: -- which is a tougher hurdle to get over.

22 MR. FRONK: That is not the standard of law, your Honor.
23 The conspiracy can be totally over and the
24 statements can be given post conspiracy, if
25 they relate to the essence of the conspiracy,

1 the Supreme Court says you can use them. That
2 is what we hashed out, Mr. Boreanaz and myself
3 and your Honor in the Miller trial, I had to
4 brief it --

5 THE COURT: Which trial?

6 MR. FRONK: Edmund Miller took the stand against Peter
7 Nazzaro, and Mr. Baker is consistent, that is
8 his office's belief, and Mr. Boreanaz argued
9 to your Honor that you can't use these because
10 the conspiracy ended, and we came up with the
11 Anderson Supreme Court case where if the
12 statements are made by co-conspirators relating
13 back to the essence of the conspiracy, I can
14 use them.

15 THE COURT: I will look at that again.

16 MR. FRONK: I will provide our cases on that, your Honor,
17 and a copy to all defense counsel.

18 THE COURT: All right. Now, I am planning to draw a jury
19 in a civil case at nine o'clock tomorrow morning,
20 and then following that we will draw a jury in
21 the two Martins' case, and we won't start the
22 trial until you have the transcripts in hand
23 that you are going to need, and then I will have
24 new jurors here, jurors who would not have been
25 contaminated by the drawing tomorrow for the

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1 17th, we would draw on the 17th in Cole and
2 Handley.

3 MR. DEMPSEY: So the record is clear, I have a standing
4 objection to the statements of the brothers
5 being used in any way, shape or form against
6 my client. Thank you, your Honor.

7 THE COURT: Highly prejudicial?

8 MR. DEMPSEY: Absolutely.

9 MR. BAKER: That is my position also.

10 THE COURT: All right. I will give attention, as soon as
11 I can, to the posture of the transcripts.

12 MR. BAKER: Thank you, your Honor.

13 MR. GRASHOW: Thank you, your Honor.

14 MR. DEMPSEY: Thank you, your Honor.

15
16 * * * * *

ORIGINAL

6/6/77

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JOHN K. ADAMS.

(Clerk)

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF N.Y.

JUN 6 3 20 PM '77

UNITED STATES

VS.

GARY COLE

Docket Number

CR 77-11 COURT

JOHN T. ELFVIN

(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that GARY COLE appeals tothe United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ Order ☐ other
(specify) _____ entered in this action on 6th DAY OF JUNE 1977

(Date)

Date
To:

6/6/77

Address

(Counsel for Appellant)
PATRICIA J. BAKER
736 BRISBANE BLDG.
BUFFALO, N.Y. 14203

Phone Number

716-854-5800

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

QUESTIONNAIRE

TRANSCRIPT ORDER

DESCRIPTION OF PROCEEDINGS
FOR WHICH TRANSCRIPT IS
REQUIRED (INCLUDE DATE).☒ I am ordering a transcript☐ I am not ordering a transcript

Reason:

☐ Daily copy is available☐ U.S. Attorney has placed order☐ Other. Attach explanation

Prepare transcript of

☐ Pre-trial proceedings☐ Trial☐ Sentence☒ Post-trial proceedings* FINDINGS OF FACT OF JUDGE ELFVIN RE:
SUPPRESSION HEARING - DATED 5/16/77The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ☒ Method of payment ☐ Funds ☐ CJA Form 21

ATTORNEY'S signature

Patricia J. Baker

DATE 6/6/77

COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and
forwarded to Court of Appeals.

Date order received

Estimated completion date

Estimated number
of pages.

Date

Signature

(Court Reporter)

COPY FOR UNITED STATES ATTORNEY

267

UNITED STATES DISTRICT COURT

Western District of N.Y.United States

vs

Zachary Martin

Docket Number

77-11Hon John T. Elfin
(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that Zachary Martin appeals tothe United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ order ☐ other(specify) _____ entered in this action on 6th Day June 1977

(Date)

(Attorney F. L. Dolan)
(Counsel for Appellant)Date 6/6/77
To:

Address

Phone Number

716-856-5470

ADD ADDITIONAL PAGE IF NECESSARY

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▶ QUESTIONNAIRE

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Prepare transcript of

- ☐
- Pre-trial proceedings
-
- ☐
- Trial
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- ☐
- Sentence
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- ☐
- Post-trial proceedings

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ATTORNEY'S signature

(Attorney F. L. Dolan)

DATE

6/6/77

▶ COURT REPORTER ACKNOWLEDGEMENT

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Date order received

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Date

Signature

(Court Reporter)

COPY FOR DEFENDANT

C 268

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORKJOHN K. ADAMS
Clerk

UNITED STATES OF AMERICA

Docket Number

CR - 77-11

VS.

Hon. John T. Elfvin

DENNIS R. MARTIN

(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that DENNIS R. MARTIN appeals to
the United States Court of Appeals for the Second Circuit from the ☒ Judgment ☐ Order ☐ other
on Supreme Hearing July 13, 1977
(specify) _____ entered in this action on _____
(Date)

Murray J. Crashow

Date 7/13/77
To: _____

Address

(Counsel for Appellant)
430 Bridge Building
Buffalo, New York 14203Phone Number 854-1700

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION - FORM B

QUESTIONNAIRE

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REQUIRED (INCLUDE DATE).☒ I am ordering a transcript☐ I am not ordering a transcript

Reason:

☐ Daily copy is available☐ U.S. Attorney has placed order☐ Other. Attach explanation

Prepare transcript of

(Suppression Hearings)

☐ Pre-trial proceedings☐ Trial☐ Sentence☐ Post-trial proceedings

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) Method of payment ☐ Funds ☐ CJA Form 21

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DATE 13-77

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Date _____

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COPY FOR DEFENDANT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The United States of America

Plaintiff-Appellee

Docket No. 77-1265

-vs-

Gary Cole, et al

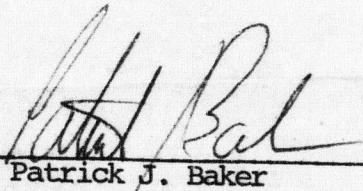
AFFIDAVIT

Defendant-Appellant

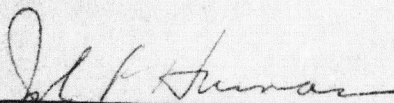
STATE OF NEW YORK)
COUNTY OF ERIE) SS
CITY OF BUFFALO)

PATRICK J. BAKER, being duly sworn, deposes and says that:

1. Your deponent personally served the Appendix for the Appeal herein upon the United States attorney for the Western District of New York on August 26, 1977.


Patrick J. Baker

Sworn to before me this
26th day of August, 1977.



Notary Public

Our Court Exp 3/30/78